

<b>Citation</b>	<p><b>Sanne Jansen, (2014),</b></p> <p><b>PRICE REDUCTION UNDER THE CISG:</b></p> <p><b>A 21ST CENTURY PERSPECTIVE</b></p> <p>Journal of Law &amp; Commerce, 32 (2), 325-379.</p>
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# PRICE REDUCTION UNDER THE CISG: A 21<sup>ST</sup> CENTURY PERSPECTIVE

Sanne Jansen\*

## I. INTRODUCTION

It is very likely that at least once in your (business) life you will encounter a situation wherein price reduction can be applied. Indeed, although it is often overlooked, price reduction can be a useful remedy for various occasions. Imagine for example that you were an indoor golf course operator and that you bought artificial turf from a seller who delivers non-conforming artificial turf: the turf is marked with white lines which have to be cut out. Well, in exactly this situation a German court considered: "*According to common usage, a golf course does not have white lines. Thus, the turf has not been in conformity with the contract, wherefore the buyer is entitled to reduce the price*".<sup>1</sup>

This decision illustrates that price reduction can be an interesting remedy for breach of contract by the seller. It is therefore not surprising that the Vienna Convention on contracts for International Sale of Goods (CISG) provides this remedy.<sup>2</sup> The CISG of course provides different remedies for breach of contract by the seller. The buyer can require performance, claim for the delivery of substitute goods or repair; he can claim for damages or even terminate<sup>3</sup> the contract under certain circumstances. But the unsatisfied buyer can also apply, as we have seen in the *artificial turf* case, a price reduction remedy. Indeed, Article 50 CISG states:

*'If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.'*

As a result, price reduction under the CISG can be defined as a proportional reduction of the price, in the occurrence of the delivery of non-conforming goods within an international sales contract. Various aspects of this price reduction have already been described in the literature,<sup>4</sup> but a thorough and comprehensive examination of this remedy is lacking. There are three more reasons why research about this remedy is of the utmost importance.

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<sup>1</sup> *Artificial turf case*, No. 25 O 99/09 (LG Stuttgart Oct. 29, 2009) (Germany), translation available at <http://cisgw3.law.pace.edu/cases/091029g1.html>.

<sup>2</sup> United Nations Vienna Convention on Contracts for the International Sale of Goods, 4 October 1980 (hereinafter 'CISG' or 'Vienna Sales Convention').

<sup>3</sup> Article 49 CISG uses the following formulation: "*may declare the contract avoided*". We will use the term 'termination' instead of 'avoidance'.

<sup>4</sup> See e.g. Ivo Bach, *Art. 50*, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG) 748, 748-767 (Stefan Kröll, et al. eds., 2011); Eric E. Bergsten & Anthony J. Miller, *The Remedy of Reduction of Price*, AM. J. COMP. L. 255, 255-277 (1979); John O. Honnold, *Article 50 Reduction of the Price*, in UNIFORM LAW FOR INTERNATIONAL SALES

First of all, the historical roots of Article 50 CISG have to be taken into account. This remedy is founded on the so-called Roman *actio quanti minoris*, which was developed in *civil law* countries (and to a lesser extent or not at all in *common law* countries).<sup>5</sup> The study of Article 50 CISG clarifies many aspects of the price reduction remedy based on the *actio quanti minoris*. At the same time, a comprehensive overview of this remedy is, of course, also interesting for countries that were not familiar with the price reduction remedy before becoming a Contracting State to the CISG.

A study of this kind is also essential from a European perspective. Article 50 CISG inspired many European *soft law* initiatives, such as the DCFR and the PECL, to include the price reduction remedy.<sup>6</sup> The Consumer Sales Directive and the recent proposed Regulation on a Common European Sales Law also introduce the price reduction remedy,<sup>7</sup> and even the commentaries from some of these instruments refer to Article 50 CISG.<sup>8</sup>

Finally, the most important reason to study Article 50 CISG is its frequent application in case law and the encountered difficulties in applying it.<sup>9</sup> The frequent application in case law makes it clear that this remedy is very relevant and useful for the international sales practice. However, case law also shows that there are a lot of uncertainties and ambiguities, for example the calculation method and the role of the judges and parties, which still need to be resolved. In this paper I will address these difficulties and I will formulate adequate and comprehensive answers.

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UNDER THE 1980 UNITED NATIONS CONVENTION 335, 335-342 (X. ed., 1999); Chengwei Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, [www.cisg.law.pace.edu/cisg/biblio/chengwei2.html](http://www.cisg.law.pace.edu/cisg/biblio/chengwei2.html) (2005); Markus Müller-Chen, *Art. 50 CISG*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 770, 770-780 (Ingeborg Schwenzer ed., 2010); Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?*, 12 PACE INTERNATIONAL LAW REVIEW 1, 1-46 (2000); Anton K. Schnyder & Ralf M. Straub, *Art. 50*, in KOMMENTAR ZUM UN-KAUFRECHT 641, 641-661 (Heinrich Honsell ed., 2010); Michael R. Will, *Art. 50*, in BIANCA-BONELL COMMENTARY ON THE INTERNATIONAL SALES LAW 368, 368-376 (M.C. Bianca & M.J. Bonell eds., 1987).

<sup>5</sup> Bach, *supra* note 4, at 749; Bergsten & Miller, *supra* note 4, at 256-257; MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 588 (2007); M. BRIDGE, THE INTERNATIONAL SALE OF GOODS 603 (2013); Anette Gärtner, *Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law*, in REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 59, II.A.1 (X. ed., 2000-2001); Alejandro Osuna Gonzalez, *Remedies under the U.N. Convention for the International Sale of Goods*, 2 INTERNATIONAL TAX & BUSINESS LAWYER 79, 91 (1984); PETER HUBER & ALASTAIR MULLIS, THE CISG 247 (2007); Liu, *supra* note 4, at n° 1; Ulrich Magnus, *Art. 50 CISG*, in VON STAUDINGERS KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT 530, n° 5 (Martinek Martinek ed., 2004); Piliounis, *supra* note 4, at 30; Erika Sondahl, *Understanding the Remedy of Price Reduction - A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods*, 7 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 255, Introduction (2003); FRANS J.A. VAN DER VELDEN, HET WEENSE KOOPVERDRAG 1980 EN ZIJN RECHTSMIDDELEN 343-344 (1988); Will, *supra* note 4, at 368.

<sup>6</sup> See Art. 9:401 PECL (Principles of European Contract Law) and Art. III.-3:601 DCFR (Draft Common Frame of Reference: C. VON BAR & E. CLIVE, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (2009)).

<sup>7</sup> See Art. 3(2) of the Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 1999, 171/12 (hereafter: Consumer Sales Directive). See also the Proposal of the European Commission of 11 October 2011 for a regulation of the European parliament and of the council on a Common European Sales Law, COM(2011) 635 final: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>. See for price reduction as a buyer's remedy: Art. 106.1(d) CESL, this remedy is elaborated in Art. 120 CESL; see for price reduction as a customer's remedy in related service contracts: Art. 155.1(d) CESL.

<sup>8</sup> See e.g. C. VON BAR & E. CLIVE, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) 913 § I(2009) (Art. 50 CISG is mentioned with regard to the calculation method of the price reduction under the DCFR).

<sup>9</sup> See the following databases, classified per Article: <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html> and <http://www.uncitral.org/clout/showSearchDocument.do>.

This paper will discuss the price reduction remedy under the Vienna Sales Convention in five different parts. I will first define its conditions of application (II), and I will examine the role of the parties and the judge (III). Another very important aspect is the calculation method of the price reduction (IV). Finally, some other characteristics of the price reduction will be examined (V), and a comparison with other remedies – *i.e.* damages and partial termination – will be made (VI).

## II. CONDITIONS OF APPLICATION

For the buyer to invoking the price reduction remedy under the CISG, six conditions must be fulfilled. Firstly, the situation has to fall within the scope of application of the CISG, – *i.e.* an international sale of moveable goods (§1). Further, there must be a breach of contract because of non-conformity of the goods with the contract (§2). The buyer must respect certain time limits (§3), while also understanding that a price reduction can only be invoked as a remedy by the buyer, not by the seller (§4). Further the price reduction remedy is subject to the seller's right to cure, under the Articles 37 or 48 CISG (price reduction is only a *subsidiary* remedy) (§5). Finally, the application of price reduction does not require a fundamental non-performance – which can be required in case of termination (Art. 49(1)(a) CISG) – or a minor non-performance (§6). In what follows I will deal with this criteria separately.

### § 1. International Sales Law

The application of the price reduction remedy is of course subject to the scope of application of the CISG. For the sake of completeness, I shall describe some of the main features. It applies to the *sale of moveable goods* between parties whose place of business are in *different* Contracting States (Art. 1(1)(a) CISG) or 'when the rules of private international law lead to the application of the law of a Contracting State' (Art. 1(1)(b) CISG).<sup>10</sup> The Convention does not apply 'to sales of goods bought for personal, family or household use' (unless the seller, at any time before or at the conclusion of the contract neither knew nor ought to have known that the goods were bought for any such use) (Art. 2(a) CISG). This means that *consumer sales contracts are excluded*.<sup>11</sup> Summarized, the Convention is applicable to international commercial sales of moveable goods. The following paragraph will elaborate some elements of its scope of application.

The Convention is, in principle, only applicable to *sales contracts*.<sup>12</sup> Articles 2(b) and (c) CISG exclude the sale by auction or on execution or otherwise by authority of law.<sup>13</sup> Article

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<sup>10</sup> About this requirement *see detailed* Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 474-477 (2013); JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 29-39 (2009); L. Mistelis, *Art. 1*, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG) 21, 23-24 (S. Kröll, et al. eds., 2011); I. Schwenzer & P. Hachem, *Art. 1*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 28, 30 and 39-43 (I. Schwenzer ed., 2010).

<sup>11</sup> Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 481; Gonzalez, *supra* note 5, at 82; F. Spohnheimer, *Art. 2*, in UN CONVENTION ON CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (CISG) 39, 40-46 (S. Kröll, et al. eds., 2011). *See similarly* Schwenzer & Hachem, *Art. 2*, *supra* note 10, at 49-51.

<sup>12</sup> About the lack of definition of this notion *see* Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 481 (2013); J. Eraww, *Wanneer is het Weens Koopverdrag van toepassing*, in HET WEENS KOOPVERDRAG 21, 37-38 (H. Van Houtte, et al. eds., 1997); Mistelis, *supra* note 10, at 22 and 28; Schwenzer & Hachem, *Art. 1*, *supra* note 10, at 31. For a creative definition following from the obligations of the seller and of the buyer (Art. 30 and 53 CISG) *see* FRITZ ENDERLEIN &

3(1) CISG states that 'contracts for the supply of goods whether to be manufactured or produced, are to be considered sales unless the party who orders the goods intends to supply a substantial part of the materials necessary for such manufacture or production'.<sup>14</sup> The Convention is also not applicable 'to contracts in which the preponderant part of the obligations to the party who furnishes the goods consists of the supply of labor or other services' (Art. 3(2) CISG). From this, it can be deduced that the *proportion* between the sale of goods and the supply of labor is crucial to determine whether or not the contract is subject to the Convention.<sup>15</sup>

Article 1 CISG indicates that it is only applicable to *moveable* goods.<sup>16</sup> Article 2 CISG excludes some goods explicitly from the scope of application of the Convention: sales of stocks, shares, investment securities, negotiable instruments or money; sales of ships, vessels, hovercraft or aircraft, and finally also the sale of electricity.<sup>17</sup>

Finally, it should be pointed out that the Convention is only applicable to *international commercial* sales contracts (and not to consumer sales contracts).<sup>18</sup> Indeed, the *international* character of the agreement is clear. Article 1 CISG states that the parties must have their place of business in *different* (Contract) States.<sup>19</sup> With regard to the *commercial* character, Article 2(a) CISG makes clear that the sale of goods meant for private use falls outside the scope of application of the Convention (see also *supra*).

## § 2. Non-conformity of the goods

The following paragraph will elucidate what is meant by 'non-conformity of the goods' under Article 50 CISG (a). I will also examine whether or not this concept includes a delay in delivery or a delivery at the wrong place (b), non-(conform) delivery of accessories or fruits (c) and third party claims (d). Finally, we will conclude that Article 50 CISG can be applied in case of an excused and an unexcused non-performance (e).

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DIETRICH MASKOW, INTERNATIONAL SALES LAW 27-28 (1992); Mistelis, *supra* note 10, at 22 and 28; Schwenger & Hachem, Art. 1, *supra* note 10, at 31.

<sup>13</sup> Erauw, *supra* note 12, at 41; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 51-52; Spohnheimer, *supra* note 11, at 46-49; Schwenger & Hachem, Art. 2, *supra* note 10, at 55-56.

<sup>14</sup> See e.g. *Dashboard mould case*, No 2010/AR/3455 (CA [Court of Appeal] Antwerp Oct. 1, 2012) (Belgium), *unpublished*. See also Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 482-483; Enderlein & Maskow, *supra* note 12, at 36-38; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 63-66; Mistelis & Raymond, Art. 3, *supra* note 5, at 54-57; Schwenger & Hachem, Art. 3, *supra* note 10, at 62-67.

<sup>15</sup> Erauw, *supra* note 12, at 42-43; Sondahl, *supra* note 5, at n° A.3.ii. See also Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 483-485 (2013); Enderlein & Maskow, *supra* note 12, at 36-38; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 66-69; Mistelis & Raymond, Art. 3, *supra* note 5, at 57-61; Schwenger & Hachem, Art. 3, *supra* note 10, at 67-72.

<sup>16</sup> Enderlein & Maskow, *supra* note 12, at 29; Erauw, *supra* note 12, at 38-39; Mistelis, Art. 1, *supra* note 10, at 31; Schwenger & Hachem, Art. 1, *supra* note 10, at 35 *et seq.*

<sup>17</sup> Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 485-487 (2013); Erauw, *supra* note 12, at 41; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 52-55; Spohnheimer, *supra* note 11, at 49-52; Schwenger & Hachem, Art. 2, *supra* note 10, at 57-60.

<sup>18</sup> See Article 2, a) CISG. See also Mistelis, Art. 1, *supra* note 10, at 33; Schwenger & Hachem, Art. 1, *supra* note 10, at 38-39.

<sup>19</sup> Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 29-30.

### a) Non-conformity

The price reduction remedy requires a breach of contract because of the non-conformity of the goods with the contract (Article 35(1) CISG).<sup>20</sup> According to Article 35(1) CISG, the conformity of a good relates to the quantity (or weight),<sup>21</sup> the quality, the description, and the packaging of the goods.<sup>22</sup> Article 35 also relates to the delivery of *different* goods than was agreed upon (an '*aliud*').<sup>23</sup> A price reduction cannot be applied if there is no non-conformity and the buyer merely regrets his purchase or if it turns out that he has paid too much for it in comparison to the market price.<sup>24</sup> Finally, it must be noted that a price reduction cannot be applied in case of a *non-delivery* because Article 50 CISG requires that "*the goods do not conform with the contract*".

Article 36 CISG states that the seller is liable for any lack of conformity which exists at the time when *the risk passes to the buyer* (see also *infra* about the transfer of risk, e), even

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<sup>20</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, n° UN DOC. A/CONF. 97/5, 42 (referring to Article 33(1) [at present Article 35(1)] CISG). *Porphyry stones case*, No. 15 O 179/01 (LG [Landgericht] Stuttgart June 4, 2002) (Germany), translation available at [cisgw3.law.pace.edu/cases/020604g1.html](http://cisgw3.law.pace.edu/cases/020604g1.html); *Dashboard mould case*, No 2010/AR/3455. See also Christoph Benicke, Art. 50 CISG, in MÜNCHENER KOMMENTAR HANDELSGESETZBUCH 573, n° 2 (K. Schmidt ed., 2004) (referring to Articles 35-36 CISG); Huber & Mullis, *supra* note 5, at 247 (referring to Articles 35 and 36 CISG); Magnus, *supra* note 5, at n° 8 (referring to Article 35 CISG and defective documents); Sophie Stijns & Raf Van Ransbeeck, *De rechtsmiddelen (algemeen)*, in HET WEENS KOOPVERDRAG 191, 204 (Hans Van Houtte, et al. eds., 1997) (referring to Article 35 CISG); Will, *supra* note 4, at 370, n° 2.1 (referring to Article 35 *et seq.* CISG).

<sup>21</sup> Sondahl is not sure whether the price reduction under Art. 50 CISG is applicable to a non-conformity with regard to the *quantity*: Sondahl, *supra* note 5, at A.3.ii. Some authors claim, albeit incorrectly, that the price reduction remedy is not applicable to a non-conformity with regard to the *quantity*: Harry M. Flechtner, *More U.S. decisions on the U.N. sales convention: scope, parol evidence, "validity" and reduction of price under article 50*, 14 J.L. & COM. 153, 169-171 (1994-95) (this author refers to the *Braun-case*; he understands this case by meaning that a price reduction would not be allowed in case of a divergence in *quantity*: *S.V. Braun, Inc. v. Alitalia-Linee Aeree Italiane, S.p.A.*, No. 91 Civ. 8484 (LBS) (S.D.N.Y. April 6, 1994), available at [cisgw3.law.pace.edu/cases/940406u1.html](http://cisgw3.law.pace.edu/cases/940406u1.html). Nevertheless, we are of the opinion that this case can also be interpreted differently). Furthermore, some authors think that the rules of Art. 51 CISG precede those of Art. 50 CISG in case of a non-conformity with regard to a shortcoming in the *quantity*: Bach, *supra* note 4, at 754-755 (with examples); Müller-Chen, *supra* note 4, at n° 2; Schnyder & Straub, *supra* note 4, at n° 10. See the authors who correctly point out that a price reduction can be applied in the case of a shortcoming of both *quality* and *quantity* VINCENT HEUZÉ, LA VENTE INTERNATIONALE DE MARCHANDISES n° 457 (2000); ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 374 (1989); Piliounis, *supra* note 4, at 31; Anton K. Schnyder & Ralf M. Straub, Art. 50, in KOMMENTAR ZUM UN-KAUFRECHT 581, n° 10 (Heinrich Honsell ed., 1997); Van Der Velden, *supra* note 5, at 344-345. For a confirmation of the last opinion, see also *Frozen plums and raspberries case*, No. T-13/05 (Foreign Trade Court of Arbitration attached to the Chamber of Commerce Jan. 5, 2007) (Serbia), translation available at [cisgw3.law.pace.edu/cases/070105sb.html](http://cisgw3.law.pace.edu/cases/070105sb.html) (application of the price reduction remedy in the case of a shortcoming in quantity).

<sup>22</sup> Article 35(2) CISG states: "(1) *The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.* (2) *Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.*" About the discussion whether or not Art. 35 CISG can determine the notion of non-conformity see INGEBORG SCHWENZER, ET AL., INTERNATIONAL SALES LAW. A GUIDE TO THE CISG 407 (2012) (see also about Art. 35 CISG: pp. 235-287). About Art. 35 CISG see S.A. KRUISINGA, (NON)-CONFORMITY IN THE 1980 UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A UNIFORM CONCEPT? 25-62 (2004).

<sup>23</sup> Kruisinga, *supra* note 22, at 27-28 and 38-42.

<sup>24</sup> See e.g. *Diaper machine case*, No. CISG/1996/36 (CIETAC Aug. 8, 1996) (China), translation available at [cisgw3.law.pace.edu/cases/960808c1.html](http://cisgw3.law.pace.edu/cases/960808c1.html) ("However, the purchase price was determined by both seller and buyer after negotiation. Buyer could not request a one-third discount simply because buyer considers the price is much higher than the price for one of a similar type in the international market").

though the lack of conformity becomes apparent only afterwards. This last phrase indicates that the price reduction remedy (and all the other remedies) can be applied in the case of non-conformity which already existed at the moment of the transfer of risk but only became apparent later on, – i.e. a *hidden defect*.<sup>25</sup>

*b) Delay or delivery at the wrong place*

According to Liu, price reduction is restricted to the delivery of non-conforming goods and cannot be applied to any other obligation of the seller.<sup>26</sup> Therefore, this remedy *cannot be applied* in case of *delay or delivery at the wrong place*.<sup>27</sup> Indeed, from the structure of the CISG we can deduce that Article 50 CISG only refers to non-conformity of the goods (Articles 35 *et seq.* CISG) and not to the time or place of delivery.<sup>28</sup>

*c) Non-(conform) delivery of accessories or fruits*

It is unclear whether Article 35(1) CISG also includes the non-(conform) delivery of the accessories or the fruits of a good. Doctrine and case law do not treat this matter. Perhaps it is part of the duty of the seller to deliver goods which are of the required 'description', as indicated by Article 35(1) CISG. The latter reasoning would result in the applicability of remedies of the CISG, such as price reduction. Actually, there is a debate about the question whether or not Article 50 CISG can be applied in case of non-performance of the duty *to hand over the documents* relating to the goods. Some authors are convinced that the omission to hand over the documents can be remedied by a price reduction.<sup>29</sup> Another part of doctrine strictly sticks to Article 35 CISG to define the concept of non-conformity, which does not mention the delivery of the documents (*cf.* Article 34 CISG).<sup>30</sup> The duty to hand over the documents is also, in my opinion, meant by the 'description of the good', as mentioned by Article 35(1) CISG. As a result, the application of price reduction is not necessarily ruled out.

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<sup>25</sup> *Frozen pork case 2*, No. VIII ZR 67/04 (BGH March 2, 2005) (Germany), translation available at [cisgw3.law.pace.edu/cases/050302g1.html](http://cisgw3.law.pace.edu/cases/050302g1.html) (at the moment of the transfer of risk there was no suspicion of contamination with dioxins, but, nevertheless, the goods were not in conformity with the contract because the possible contamination with dioxins is to be considered a hidden defect).

<sup>26</sup> Liu, *supra* note 4, at n° 4.1.

<sup>27</sup> See also *Shoes case 3*, No. 36 O 178/95 (LG [Landgericht] Düsseldorf March 5, 1996) (Germany), translation available at [cisgw3.law.pace.edu/cases/960305g1.html](http://cisgw3.law.pace.edu/cases/960305g1.html) (no application of Art. 50 CISG in case of late delivery). See also Schnyder & Straub, *Art. 50, supra* note 21, at n° 12 (1997) (Art. 50 CISG cannot be applied in case of late delivery, delivery at the wrong place, non-delivery of necessary documents, and lack of providing property); Schnyder & Straub, *Art. 50, supra* note 4, at n° 12 (2010) (*idem*). The following authors believe that Art. 50 CISG cannot be applied in case of a *late* delivery: Bach, *supra* note 4, at 752 (this author adds that Art. 50 CISG is not applicable in case of non-delivery); Huber & Mullis, *supra* note 5, at 247; Magnus, *supra* note 5, at n° 8; Van Der Velden, *supra* note 5, at 345.

<sup>28</sup> Honnold, *Article 50 Reduction of the Price, supra* note 4, at § 313.1 (this author seems to add that Art. 50 CISG is not applicable in case of non-delivery of the necessary documents (Art. 31-34 CISG) or the existence of third party claims (Art. 41 CISG, see also *infra, d*) and other requirements by the contract (Art. 30 CISG)); Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, supra* note 10, at n° 313.1.

<sup>29</sup> Magnus, *supra* note 5, at n° 8.

<sup>30</sup> Honnold, *Article 50 Reduction of the Price, supra* note 4, at § 313.1; Schnyder & Straub, *Art. 50, supra* note 21, at n° 12 (2010).

#### d) Third party claims

There are still many discussions in the doctrine around the question of whether or not price reduction can be applied if the value of the good reduces because of third party claims.<sup>31,32</sup>

To this point, some legal scholars think that price reduction cannot be applied in case of third party claims. There are some good reasons to accept this point of view. At the Vienna diplomatic conference, the Norwegian delegation submitted an amendment which made the application of Article 50 CISG possible in case of third party claims.<sup>33</sup> This amendment has never been accepted due to pressure of time.<sup>34</sup> Another argument is that the term 'non-conformity', being a technical term, has to be interpreted consistently for the whole Convention, referring to the Articles 35 and 36 CISG.<sup>35</sup> Moreover, some of the authors, who think that price reduction cannot be applied in case of third party claims, claim that the wording of Article 50 CISG only refers to the non-conformity of the goods and not to third party claims.<sup>36</sup> A further argument is that the calculation method of price reduction under Article 50 CISG would be inappropriate in case of third party claims.<sup>37</sup> It is argued that it is very difficult to assess the '(reduction in) value' if a good is affected by third party claims. This means that only the assessment of the losses is possible. When following this argument, the buyer can only be compensated by receiving damages. Bach adheres to this point of view by invoking reasons of legal certainty and stressing the need to apply the concept of 'non-conformity' in a coherent way throughout the Convention.<sup>38</sup> Nevertheless, *de lege ferenda*, he is in favor of an extension of Article 50 CISG to third party claims, because there are no reasons to treat the two situations (non-conformity of the goods and third party claims) differently.<sup>39</sup>

On the other hand, some legal scholars believe that Article 50 CISG can be applied in case of third party claims. A first argument is based on the fact that Article 44 CISG refers to Article 50 CISG. This is an important argument, because Article 44 is also applicable, next to

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<sup>31</sup> For an overview of the different points of view see Will, *supra* note 4, at 375-376, 3.4 (more research has to be done before he can take up a position). See also Huber & Mullis, *supra* note 5, at 247-248; Liu, *supra* note 4, at n° 4.1; CHENGWEI LIU, REMEDIES IN INTERNATIONAL SALES 121-124 (2007); PETER SCHLECHTRIEM, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS AND INTERNATIONAL SALE OF GOODS 79 (1986) (in principle, price reduction should be applicable in case of third party claims, however, in such a case it is difficult to work out a formula to calculate the reduction in value); Sondahl, *supra* note 5, at n° A.3.ii.

<sup>32</sup> The terms 'third party claim' and 'legal defect' will both be used.

<sup>33</sup> For the amendment proposal of Norway, see UN Doc. A/CONF.97/C.1/L.167. For the discussions in the first committee, see also Official Records, Summary records of meetings of the First Committee, 23rd meeting, 360 and <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, UN. Doc. A/CONF.97/11, <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

<sup>34</sup> For this argument, see Müller-Chen, *supra* note 4, at n° 2 (damages would be more appropriate); Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.2.3 (damages would be more appropriate). Seems to accept this point of view: Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 313.1; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at n° 313.1. For an overview of this first position (without taking stance), see also Will, *supra* note 4, at 375-376, n° 3.4.

<sup>35</sup> Huber & Mullis, *supra* note 5, at 248. The following authors also believe that the wording and the structure of the Convention rule out the application of Art. 50 CISG to third party claims: Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 11 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 11 (2010).

<sup>36</sup> For the same point of view see Piliounis, *supra* note 4, at 36.

<sup>37</sup> Heuzé, *supra* note 28, at 412; Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 313.1; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at n° 313.1; Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.2.3.

<sup>38</sup> Bach, *supra* note 4, at 753.

<sup>39</sup> Bach, *supra* note 4, at 754.



(material) non-conformity, to third party rights.<sup>40</sup> Article 44 CISG assumes the application of price reduction in the specific situation that the buyer has not notified the non-conformity, but has a reasonable excuse for his failure to give the required notice: "*Notwithstanding the provisions of paragraph (1) of Article 39 [to give notice of the non-conformity], and paragraph (1) of Article 43 [to give notice of third party claims], the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice*". It is argued that if price reduction can be applied in this particular situation, one must extend the scope of application of price reduction in case of third party claims to other situations? A further argument is, the coherence of and the equality of, both material and legal defects.<sup>41</sup> When following this argument we can avoid the difficult delineation between material defect (with regard to the quality) and legal defects (such as third party claims).<sup>42</sup>

Because of the lack of a clear solution in the text of the CISG, courts (will) have to decipher this difficult problem.<sup>43</sup>

I believe that many elements indicate that the second point of view (price reduction can be applied in case of third party claims) should be subscribed to. Indeed, it is often difficult to differentiate between 'material' and 'legal' defects of a good. Secondly, the argument that the *calculation* of the price reduction in case of a legal defect would be more difficult if it is of no value. Also in case of *qualitative* shortcomings of the good, it is difficult to assess the reduction of value. Nevertheless, it cannot be denied that the preparatory documents of the CISG speak against the application of the price reduction in case of a legal defect. On the one hand it would be extremely desirable that any revision of the CISG would clarify this issue. On the other hand I would, with no revision of the CISG ahead, welcome any development in the case law that would accept the price reduction in case of third party claims.

#### *e) Excused and unexcused non-performance*

Article 36(1) CISG states that the seller is *liable* for every lack of conformity of the goods which exists at *the time when the risk passes* to the buyer (even though the lack of conformity becomes apparent only after that time).<sup>44</sup> Articles 66-70 CISG regulate the *moment of the transfer of risk*.<sup>45</sup> In some cases the risk only passes when the goods are handed over to the first carrier for transmission to the buyer,<sup>46</sup> in other cases the risk passes from the time of conclusion of the contract<sup>47</sup> or when the buyer takes over the goods<sup>48</sup>.

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<sup>40</sup> KARL H. NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES 357-358 (1993). For the same reasoning (without taking stance) *see* Will, *supra* note 4, at 376, n° 3.4. *Contra* Bach, *supra* note 4, at 753.

<sup>41</sup> Neumayer & Ming, *supra* note 40, at 108.

<sup>42</sup> PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES 152 (2009). *See also* Magnus, *supra* note 5, at n° 10 (there is no objective difference between material and legal defects which would justify a different treatment).

<sup>43</sup> Sondahl, *supra* note 5, at n° A.3.ii.

<sup>44</sup> No liability for the seller (and no price reduction for the buyer) if the non-conformity *arises* after the transfer of risk: *Meat case*, No. 2 O 291/98 (LG [Landgericht] Flensburg March 24, 1999) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/990324g2.html](http://cisgw3.law.pace.edu/cases/990324g2.html).

<sup>45</sup> *See detailed* Manuel Gustin, *Passing of risk and impossibility of performance under the CISG*, 3/4 IBLJ 379, 379-400 (2001).

<sup>46</sup> Art. 67(1) CISG.

<sup>47</sup> Art. 68 CISG.

<sup>48</sup> Art. 69 CISG.

It is important to first point to the fact that the CISG, in principle, does *not require a fault* of the seller to enable the buyer to claim *damages* for non-conformity.<sup>49</sup>

Further, Article 79(5) CISG states that each remedy, except for damages, can be applied to the case of an "*impediment beyond his [the seller's] control*".<sup>50</sup> Therefore, an objective non-conformity is enough to apply a price reduction, independent from the fact of whether or not the seller is responsible for the non-conformity,<sup>51</sup> and whether or not he can invoke the liberating circumstances of Article 79 CISG (see also in relation to damages *infra*, VI.§2).<sup>52</sup> This means that the price reduction remedy does not depend on the contractual liability of the seller. Nevertheless, after the transfer of risk it is not possible anymore to invoke a remedy, because the buyer bears the risk. According to Article 69 CISG, the risk often passes only to the buyer when he takes over the goods or as soon as the goods are placed at his disposal. This means that the price reduction remedy can still be applied after the *consensus* until the transfer of risk, when the goods would have partially perished due to an 'impediment beyond the seller's control'. In some countries (such as France and Belgium) the transfer of risk in sales contracts of '*species* goods' takes place at the moment of the consensus. Consequently, these countries apply the classical *res perit domino*-rule. This means that the buyer bears the risk after the consensus for any loss of the good and will have to pay the price even when the goods cannot be delivered due to *force majeure*. Nevertheless, in the very common case of the sale of *genus* goods other rules apply; the risk will only pass at the specification of these goods. Specification will often coincide with the *delivery* of the *genus* goods. This shows that often, even in countries with a consensus based system, similar rules to the CISG with regard to the passing of the risk will apply.

### § 3. Time limits

Hereafter we will find that the CISG states time limits for the notification of a *non-conformity* of the good (see *infra*, III.§1.c). While termination has to be done within certain time limits according to Article 49(2) CISG ("*within reasonable time*"), the Convention does not state any time limit for the buyer to exercise the *price reduction remedy*.<sup>53</sup>

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<sup>49</sup> See Bach, *supra* note 4, at 749; Benicke, *supra* note 20, at n° 1; Bergsten & Miller, *supra* note 4, at 258-259; Gärtner, *supra* note 5, at II.A.2.a; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at n° 313; Kritzer, *supra* note 21, at 375; Kruisinga, , *supra* note 22, at 123; CHENGWEI LIU & MARIE S. NEWMAN, REMEDIES IN INTERNATIONAL SALES: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES AND PECL 101-102 (2007); Piliounis, *supra* note 4, at 30; Will, *supra* note 4, at n° 1.2.

<sup>50</sup> For the scope of application of Article 79(5) CISG see also Article 79(1) CISG: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences".

<sup>51</sup> About the discussion whether non-conformity suffices to apply Art. 79 CISG or whether non-delivery or late delivery is required to apply Art. 79 CISG see Kruisinga, *supra* note 22, at 127-132 (is correctly of the opinion that a non-conformity suffices).

<sup>52</sup> Müller-Chen, *supra* note 4, at 772, nr 2. See also Huber & Mullis, *supra* note 5, at 250; S. Jansen, *Price reduction as a remedy in European contract law and the consumer acquis*, in ALTERNATIVE WAYS TO IUS COMMUNE. THE EUROPEANISATION OF PRIVATE LAW 169, 180 (A. Keirse & M. Loos eds., 2012); Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 17 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 17 (2010); Schwenger, et al., INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, *supra* note 22, at 407 ("*liability under Article 79 is irrelevant*"). But see Van Der Velden, *supra* note 5, at 348-349 (this author believes that the application of Art. 50 CISG can only be precluded in the circumstances of Art. 79 CISG if the price reduction remedy is considered a *species* of damages. Afterwards, on p. 350, he concludes that price reduction cannot be compared with damages).

<sup>53</sup> Bach, *supra* note 4, at 758 (refers to the national time limits and the UN-Convention of 1974 on the Limitation Period in the International Sale of Goods); Huber & Mullis, *supra* note 5, at 250; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 131-132; Kritzer, *supra* note 21, at 377; Kruisinga, *supra* note 22, at 99-104; Magnus, *supra* note 5, at n° 17 (refers to

#### § 4. A buyer's remedy

The price reduction remedy under the CISG is only a buyer's remedy and cannot be used as a seller's remedy.<sup>54</sup> Indeed, it is logical that only the buyer can 'reduce a *price*' in case of non-performance of the seller. However, a 'reduction of performances' would be an alternative which would allow the seller to remedy a partial payment by the buyer;<sup>55</sup> the drafters of the CISG have however not provided this.

#### § 5. Price reduction is subsidiary to the seller's right to cure

The CISG provides different remedies for a breach of contract by the seller. The buyer can require performance, claim for the delivery of substitute goods or repair; or he can claim for damages, apply a price reduction or terminate the contract.<sup>56</sup>

The CISG favors the remedies that intend to 'maintain' the contract: such as performance, repair and replacement. Termination can only be applied after a reasonable period of time (in case of non-delivery) or in case of a fundamental non-performance (Art. 49(1) CISG). Price reduction is subject to the *seller's right to cure*, by virtue of Articles 37 or 48 CISG (Art. 50, second sentence CISG).<sup>57</sup> If the buyer refuses to accept a performance according to Articles 37 or 48 CISG, he loses his right to reduce the price (Art. 50 CISG *in fine*).

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the national time limits); Müller-Chen, *supra* note 4, at 773, n° 4 (refers to the national time limits); Neumayer & Ming, *supra* note 40, at 355; Schnyder & Straub, Art. 50, *supra* note 21, at n° 28 (1997); Schnyder & Straub, Art. 50, *supra* note 4, at n° 28 (2000) (refer to the national time limits); Sondahl, *supra* note 5, at n° A.2 (no requirement to exercise it within a 'reasonable time limit'); Van Der Velden, *supra* note 5, at 347; Will, *supra* note 4, at 372, n° 2.1.3 (refers to the national time limits). For a case in which the difference between a price reduction (no time limit) and termination (time limit) is stressed see *Coffee machines case*, No. 3 Ob 193/04k (OGH May 23, 2005) (Austria), *translation available at* [cisgw3.law.pace.edu/cases/050523a3.html](http://cisgw3.law.pace.edu/cases/050523a3.html). For other cases in which a price reduction is not precluded when the time limit for termination has elapsed see *Christmas trees case*, No. BS 9700016-4 (Randers Byret [County Court] Nov. 4, 1998) (Denmark), *translation also available at* <http://cisgw3.law.pace.edu/cases/981104d1.html>; *Window frames case*, No. C/12709/2001 (CA Genève Nov. 15, 2002) (Switzerland), *translation available at* [cisgw3.law.pace.edu/cases/021115s1.html](http://cisgw3.law.pace.edu/cases/021115s1.html); *Plants case*, No. 2 O 51/02, (LG Bamberg Oct. 23, 2006) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/061023g1.html](http://cisgw3.law.pace.edu/cases/061023g1.html) (implicitly); *Bottles case*, No. 2 U 923/06 (OLG Koblenz Dec. 14, 2006) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/061214g1.html](http://cisgw3.law.pace.edu/cases/061214g1.html).

<sup>54</sup> Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 107.

<sup>55</sup> See Article 8:301 of the *Acquis Principles* (ACQP) which provides a 'reduction of performances' instead of a 'price reduction'. See also J. Pisulinski, et al., *Termination and reduction of performance*, in CONTRACT II: GENERAL PROVISIONS, DELIVERY OF GOODS, PACKAGE TRAVEL AND PAYMENT SERVICES IN PRINCIPLES OF THE EXISTING EC CONTRACT LAW (ACQUIS PRINCIPLES) 411, 414 (Acquis Group. Research group on the existing EC private law ed., 2009).

<sup>56</sup> Require performance: Art. 46(1) CISG; repair: Art. 46(3) CISG; delivery of substitute goods: Art. 46(2) CISG; price reduction: Art. 50 CISG; termination: Art. 49 CISG (only in case of a fundamental breach of contract or in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer according to Article 47(1) CISG or if he declares that he will not deliver within the period so fixed).

<sup>57</sup> Art. 50 CISG *juncto* artt. 37 and 48 CISG. Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 43. About the fact that the price reduction is subordinate to the seller's right to cure see *Furniture case*, No. 6252 (Pretore della giurisdizione di Locarno Campagna April 27, 1992) (Switzerland), *translation available at* [cisgw3.law.pace.edu/cases/920427s1.html](http://cisgw3.law.pace.edu/cases/920427s1.html) (price reduction was still possible for the second part of the goods); *Acrylic blankets case*, No. 2 U 31/96 (OLG Koblenz Jan. 31, 1997) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/970131g1.html](http://cisgw3.law.pace.edu/cases/970131g1.html) (with regard to termination and price reduction; price reduction was not applied); *Canned food case* 2, No. S 97/324 (CA Turku Nov. 12, 1997) (Finland), *translation available at* [cisgw3.law.pace.edu/cases/971112f5.html](http://cisgw3.law.pace.edu/cases/971112f5.html) (price reduction was still possible); Russia Arbitration proceeding, No. 126/2004 (Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry March 23, 2005), *translation available at* [cisgw3.law.pace.edu/cases/050323r1.html](http://cisgw3.law.pace.edu/cases/050323r1.html) (a price reduction was not allowed because the seller replaced the defect goods). Müller-Chen, *supra* note 4, at 773-774, n° 7; Will, *supra* note 4, at n° 1.1, 1.3.1, 2.3.

Article 37 CISG introduces the seller's right to cure if he has delivered the goods *before* the date for delivery. The seller's right to cure will only be restricted if it causes the buyer unreasonable inconvenience or unreasonable expenses.

Article 48 CISG introduces the seller's right to cure *after* the date for delivery. The seller's right to cure will be restricted if it causes the buyer unreasonable delay and unreasonable inconvenience, or if it causes uncertainty of reimbursement by the seller of expenses advanced by the buyer.<sup>58</sup> Moreover, Article 48(2) CISG states that the seller can request the buyer to make known whether he will accept performance. If the buyer does not comply with this request within a reasonable time, the seller may perform within the time indicated by his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller (such as the price reduction remedy).

We can conclude that the CISG introduces a clear hierarchy between the remedies which aim the performance of the contract (primary remedies) and price reduction (secondary remedy).<sup>59</sup> The reason of the precedence of the primary remedies presumably lies in the buyer's duty to mitigate damages, and the intention to balance the interests of the buyer and the seller.<sup>60</sup> Furthermore, the seller's right to cure is consistent with the intention of the drafters of the CISG to safeguard the performance of the contract.<sup>61</sup>

Apart from that, Article 47 CISG makes it possible for the buyer to fix *himself* a reasonable period for performance by the seller, if he does not want to wait for the reasonable period of Article 48 CISG. The use of Article 47 is *not required* by Article 50 CISG. If the buyer uses Article 47 CISG, he may not, during that period, resort to any remedy for breach of contract (such as a price reduction). If this period has elapsed, it is clear that the seller cannot perform within a reasonable period, as required by Article 48(1) CISG. As a consequence, the buyer can immediately apply the price reduction remedy.<sup>62</sup>

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<sup>58</sup> *Racing carts case*, No. 3 O 196/01 (LG Cologne March 25, 2003) (Germany), translation available at [cisgw3.law.pace.edu/cases/030325g1.html](http://cisgw3.law.pace.edu/cases/030325g1.html) (taking into account the intention to use the 'carts' in a 24-hour race, it would have been unreasonable to give the seller the possibility to repair the defects or to deliver substitute-carts. Consequently, a price reduction can only be applied for all defects repaired by the buyer *before* the race).

<sup>59</sup> About the hierarchy of remedies in the CISG see Benicke, *supra* note 20, at n° 4-7; Stefan Grundmann, *Consumer law, commercial law, private law: how can the Sales Directive and the Sales Convention be so similar?*, 14 EBLR 237, 240-243 (2003); Jansen, *supra* note 52, at 177. See also Huber & Mullis, *supra* note 5, at 249 ("the seller's right to cure takes precedence over the buyer's right to reduce the price"); Magnus, *supra* note 5, at n° 27 ("Trotz des Wortlauts [...] räumt die Vorschrift dem Nacherfüllungsrecht des Verkäufers ganz grundsätzlich den Vorrang vor dem Minderungsverlangen des Käufers ein.")

<sup>60</sup> Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 4.3 (and the intention "to preserve the parties' bargain wherever possible"); Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 129-130. See also Bergsten & Miller, *supra* note 4, at 265 (although the duty to mitigate damages of Article 73 draft-CISG is not applicable, the same result is reached by Article 46 draft-CISG. This Article enables the seller to cure the non-conformity); Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 313 (about the duty to mitigate damages); Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION*, *supra* note 10, at n° 313 (about the duty to mitigate damages); Piliounis, *supra* note 4, at 35 (about the balancing of interests of both buyer and seller).

<sup>61</sup> Bach, *supra* note 4, at 755.

<sup>62</sup> Huber & Mullis, *supra* note 5, at 249-250. The following author believes that it is advisable for the buyer to fix the seller a period for performance. As a consequence, the buyer can apply a price reduction if the fixed period elapses without any performance by the seller: Magnus, *supra* note 5, at n° 29. Accord Benicke, *supra* note 20, at n° 6.

## § 6. The non-conformity does not need to be fundamental or minor

The price reduction remedy of Article 50 CISG can be applied independent of the fact to whether the non-conformity is fundamental or not.<sup>63,64</sup> It suffices that the value of the goods is reduced because of the non-conformity of the goods.<sup>65</sup> We can deduce from this that there is no requirement of a 'minimum' degree of seriousness of the non-conformity.<sup>66</sup>

Furthermore, the CISG does not impose a 'maximum' degree of seriousness of the non-conformity. This means that the CISG does not require that the non-conformity has to be minor or very small to apply the price reduction remedy. As a result, the non-conformity may be very modest.<sup>67</sup> In this case it might be, however, more difficult for the buyer to prove the reduction in value of the good.<sup>68</sup>

## III. THE ROLE OF THE PARTIES AND THE JUDGE

### § 1. The role of the parties

#### *a) The buyer's right to choose and the hierarchy of remedies*

The wordings of Article 50 CISG show that the price reduction must be considered a buyer's choice. Indeed, this Article states that "*the buyer may reduce the price*".

Nevertheless, the buyer's right to choose is not free. We have already seen that the price reduction remedy of Article 50 is conceived as a secondary remedy (see *supra*, II.5). The buyer can only apply this remedy if the seller does not succeed in his right to cure or does not use his right to cure. The precedence of the seller's right to cure introduces a hierarchy between the different remedies. The buyer can only apply a price reduction if the seller does not wish to exercise his right to cure or does not cure within a certain period.

Apart from this, it is logical that the buyer cannot combine the price reduction remedy with a claim for (full) performance, repair and replacement or with the complete termination of the contract.<sup>69</sup> However, a combination with a claim for damages can be allowed to a certain extent (see also *infra*, V.5 en VI.2).

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<sup>63</sup> Netherlands Court of First Instance Rotterdam 1 June 2011, n° 284566 / HA ZA 07-1344, [www.rechtspraak.nl](http://www.rechtspraak.nl) (the application of a price reduction does not require a fundamental defect). Accord Benicke, *supra* note 20, at n° 3; Leonardo Graffi, *Case law on the concept of "fundamental breach" in the Vienna Sales Convention*, 3 IBLJ 338, 338 (2003); Heuzé, *supra* note 28, at n° 459; Huber & Mullis, *supra* note 5, at 250; Magnus, *supra* note 5, at n° 13; Schnyder & Straub, *Art. 50, supra* note 21, at n° 13-14 (1997); Schwenger, et al., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, supra* note 22, at 407.

<sup>64</sup> About the concept 'fundamental breach' see Franco Ferrari, *Fundamental breach of contract under the UN Sales Convention - 25 years article 25 CISG*, 3 IBLJ 389, 389-400 (2005); Graffi, *supra* note 63, at 338-349; Stijns & Van Ransbeeck, *supra* note 20, at 192-201.

<sup>65</sup> Benicke, *supra* note 20, at n° 3.

<sup>66</sup> Schnyder & Straub, *Art. 50, supra* note 21, at n° 15 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 15 (2010).

<sup>67</sup> About the possibility to apply remedies in case of minor discrepancies see also Kruisinga, *supra* note 22, at 36-37.

<sup>68</sup> Schnyder & Straub, *Art. 50, supra* note 21, at n° 15 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 15 (2010).

<sup>69</sup> Müller-Chen, *supra* note 4, at 779, n° 17; Van Der Velden, *supra* note 5, at 345-346. See also Schwenger, et al., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, supra* note 22, at 405 ("it prevents the buyer from 'double-dipping'").

*b) In principle an extrajudicial price reduction*

The price reduction remedy of Article 50 CISG can be applied *unilaterally* by the buyer.<sup>70</sup> This means that the buyer, without the prior intervention of the judge, may adjust the contract. Consequently, the buyer can invoke the price reduction by a unilateral declaration (see *infra*, d).<sup>71</sup> This does not alter the fact that the judge can carry out an examination *a posteriori*, if the seller does not agree with the unilateral price reduction declaration or with its calculation.

It has to be noted that the unilateral character of price reduction will often be an illusion.<sup>72</sup> First of all, the seller can disagree with the proportion of the price reduction or with the finding of non-conformity. These conflicts will have to be decided by a judge. Nevertheless, these conflicts will not always rule out a unilateral price reduction. The role of the judge will often be reduced to an examination *a posteriori*. However, there will be a prior intervention of the judge if the buyer has already paid the purchase price, and the seller refuses to pay back (part) of this price (see also *infra*, §2.1).<sup>73</sup> A prior intervention of the judge is also needed in the case that the seller claims the full price in court, and the buyer argues that he is entitled to a price reduction.

*c) Examination and notification in case of non-conformity*

Before exercising his choice for a price reduction, the buyer has, according to Article 38 CISG, to *examine* the goods or cause them to be examined.<sup>74</sup>

Secondly, the buyer has to give *notice* to the seller specifying the nature of the lack of conformity. This notification has to be distinguished from the notification to invoke a remedy (such as price reduction) as such (see *infra*, d). The buyer has to notify the seller, in accordance with Article 39 CISG of the lack of conformity by means of a notification.<sup>75</sup> This

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<sup>70</sup> *Window frames case*, No. C/12709/2001. Bach, *supra* note 4, at 751 and 756; Bergsten & Miller, *supra* note 4, at 263; Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 603 (2013); Fritz Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 133, 197 (P. Sarcevic & P. Volken eds., 1996); Gonzalez, *supra* note 5, 92; Kritzer, *supra* note 21, at 375-376; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 2; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 104-105; Neumayer & Ming, *supra* note 40, at 355; Magnus, *supra* note 5, at n° 1; Piliounis, *supra* note 4, at 31; Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 29 (2010); Stijns & Van Ransbeeck, *supra* note 20, at 204; Van Der Velden, *supra* note 5, at 347; Will, *supra* note 4, at 372, n° 2.1.3.

<sup>71</sup> See also Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 4.4.

<sup>72</sup> For an overview of all the elements that hinder an extrajudicial price reduction see Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 2; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 105-106; Piliounis, *supra* note 4, at 31-32.

<sup>73</sup> Only about this aspect see Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales in the United Kingdom*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 11, IV.C.5 (X. ed., 2000-01).

<sup>74</sup> See the wording of Article 38 CISG: "(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. (2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. (3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination". See also *Cashmere sweaters case*, No. 7 U 4427/97 (OLG Munich March 11, 1998) (Germany), CLOUT abstract n° 20, available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/310.htm> (the buyer loses, amongst others, his right to apply a price reduction if he does not examine the goods timely). About the buyer's duty to examine the goods see Kruisinga, *supra* note 22, at 65-76.

<sup>75</sup> Bach, *supra* note 4, at 758; Benicke, *supra* note 20, at n° 3; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 4.2; Heuzé, *supra*

Article states that the buyer has to notify the seller specifying the nature of the lack of conformity<sup>76</sup> within a reasonable time,<sup>77</sup> after he has discovered it or ought to have discovered it.<sup>78</sup> The fact that the buyer has to notify the seller after he *ought to have discovered* the non-conformity makes the link with the buyer's duty to examine the goods.<sup>79</sup> The buyer will lose his right to rely on a lack of conformity (and thus the right to invoke a remedy such as price reduction) if he does not give the seller notice thereof within a reasonable time<sup>80</sup> or if he does not specify the non-conformity sufficiently<sup>81</sup>.<sup>82</sup> Moreover, Article 39 CISG states that the buyer loses the right to rely on a lack of conformity in any event, if he does not notify the seller within a period of *two years* from the date on which the goods were actually handed over to the buyer. This notification does not necessarily require a specific form, and can be

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note 28, at n° 457; Kruisinga, *supra* note 22, at 63 *et seq.*; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 125-127; Müller-Chen, *supra* note 4, at 772, n° 3; Schnyder & Straub, Art. 50, *supra* note 21, at n° 18 (1997); Schnyder & Straub, Art. 50, *supra* note 4, at n° 18 (2010).

<sup>76</sup> About this requirement *see* Kruisinga, *supra* note 22, at 89-95.

<sup>77</sup> About the notion 'reasonable time' *see* Kruisinga, *supra* note 22, at 76-89.

<sup>78</sup> The price reduction remedy can be applied if the condition of Art. 39 CISG is fulfilled: *Canned food case 1*, No. 95/11193 (Tampere Court of First Instance Jan. 17, 1997) (Finland), *translation available at* [cisgw3.law.pace.edu/cases/970117f5.html](http://cisgw3.law.pace.edu/cases/970117f5.html); *I.S. Trading v. Vadotex*, No. 1995/AR/1558 (CA Antwerp Nov. 4, 1998) (Belgium), *available at* [unilex.info/case.cfm?pid=1&do=case&id=810&step=FullText](http://unilex.info/case.cfm?pid=1&do=case&id=810&step=FullText), *translation available at* [cisgw3.law.pace.edu/cases/981104b1.html](http://cisgw3.law.pace.edu/cases/981104b1.html) (the condition of Article 39 CISG is fulfilled, but strangely the notification period of the standard terms was already expired); *Tomatoes case*, 2002-03 RW 1351; *Potatoes case 1*, No. 16 U 57/05 (OLG Cologne Aug. 14, 2006) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/060814g1.html](http://cisgw3.law.pace.edu/cases/060814g1.html); *Plants case*, No. 2 O 51/02 (if a multitude of the same goods (plants) are sold a notification for all the goods suffices; a notification per plant is not necessary); *Bottles case*, No. 2 U 923/06 (a price reduction can be applied when the seller has been notified timely and correctly by the buyer; it is sufficient that the seller is notified of the non-conformity and is able to remedy it; it suffices that the buyer describes the symptoms of the defect, and it is not necessary that he establishes the cause of the defect); *Poppy seed case*, No. 43 Cg 34/05f, (Handelsgericht Vienna May 3, 2007) (Austria), *translation available at* [cisgw3.law.pace.edu/cases/070503a3.html](http://cisgw3.law.pace.edu/cases/070503a3.html) (very detailed); *Potatoes case 2*, n° 5 Cb/114/2006 (District Court Komarno February 24, 2009) (Slovakia), *translation available at* [cisgw3.law.pace.edu/cases/090224k1.html](http://cisgw3.law.pace.edu/cases/090224k1.html); *Anchovies case*, WestlawEs (2010/385754) (Audiencia Provincial de Asturias sección 7ª Sept. 29, 2010) (Spain), *abstract available at* [cisgw3.law.pace.edu/cases/100929s4.html](http://cisgw3.law.pace.edu/cases/100929s4.html); *Indice SL v. Defendant*, No. 284566 / HA ZA 07-1344 (Rb Rotterdam June 1, 2011) (Netherlands), *available at* [www.rechtspraak.nl](http://www.rechtspraak.nl).

<sup>79</sup> Kruisinga, *supra* note 22, at 65.

<sup>80</sup> If this condition of Article 39 CISG is not fulfilled, the price reduction remedy cannot be applied: *Tinned cucumbers case*, No. 17 U 82/92 (OLG Düsseldorf Jan. 8, 1993) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/930108g1.html](http://cisgw3.law.pace.edu/cases/930108g1.html); *Waste container case*, No. Vb 94131 (Arbitration Court of the Chamber of Commerce and Industry of Budapest Dec. 5, 1995) (Hungary), *translation available at* [cisgw3.law.pace.edu/cases/951205h1.html](http://cisgw3.law.pace.edu/cases/951205h1.html); *Granite rock case*, No. 22 S 234/94 (LG Stendal Oct. 12, 2000) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/001012g1.html](http://cisgw3.law.pace.edu/cases/001012g1.html); *Live sheep case*, No. 11 U 40/01 (OLG Schleswig Aug. 22 2002) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/020822g2.html](http://cisgw3.law.pace.edu/cases/020822g2.html); *Flowers case*, No. 28 O 20906/06 (LG Munich May 18, 2009) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/090518g1.html](http://cisgw3.law.pace.edu/cases/090518g1.html), *available at* <http://globalsaleslaw.com/content/api/cisg/urteile/1998.pdf>; *Groente- en Fruithandel Heemskerk B.V. v. Frutas Caminito Sociedad Cooperativa Valenciana*, No. 87379 / HAZA 07-716 (Hof Arnhem Jan. 28, 2010) (Netherlands), *translation available at* <http://cisgw3.law.pace.edu/cases/100128n1.html>, *available at* [www.rechtspraak.nl](http://www.rechtspraak.nl).

<sup>81</sup> *Leather goods case*, No. 7 U 2070/97 (OLG Munich July 9, 1997) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/970709g1.html](http://cisgw3.law.pace.edu/cases/970709g1.html) (the buyer has not sufficiently specified the nature of the non-conformity in the notification of Art. 39 CISG and therefore he has no right to apply a price reduction under Art. 50); *Hungarian wheat case*, No. 7 U 10/04 (OLG Karlsruhe Feb. 8, 2006) (Germany), *translation available at* [cisgw3.law.pace.edu/cases/060208g1.html](http://cisgw3.law.pace.edu/cases/060208g1.html) (the notification of Art. 39 CISG has to indicate the non-conformity and the nature of it).

<sup>82</sup> *See Pumpkin case*, No. 36 Cbm/6/2003 (Regional Court Trnava Jan. 12, 2006) (Slovakia), *translation available at* [cisgw3.law.pace.edu/cases/060112k1.html](http://cisgw3.law.pace.edu/cases/060112k1.html) (insufficient notification because it was sent to the wrong company). *See also Maize case*, No. F03-A73/05-1/4096 (Federal Arbitration Court for the Far East Area Jan. 24, 2006) (Russia), *translation available at* [cisgw3.law.pace.edu/cases/060124r1.html](http://cisgw3.law.pace.edu/cases/060124r1.html), CLOUT abstract n° 11 (cassation of a court decision because of the fact that it was not proved that the condition of Art. 39 CISG was respected by the buyer).

done over the phone.<sup>83</sup> The requirement to notify the seller has exceptions, which we will not touch upon in this contribution.<sup>84</sup>

*d) The notification of the price reduction or the price reduction declaration*

The fact that the price reduction can be applied unilaterally, without prior intervention of a judge, has a direct influence on the application of the remedy.

A *notification of the non-conformity* of the goods is necessary, in case of a *judicial* price reduction under Article 50 CISG (see *supra*, c). Afterwards, it is sufficient to ask price reduction in a statement of claim or defense or in the writ of summons.<sup>85</sup>

If the price reduction is applied *extra-judicially*, the buyer also has to *notify* the seller in exercising unilaterally the price reduction remedy. Indeed, he has to inform the seller of his choice to apply price reduction. The mere payment of a reduced price will not suffice because it is unclear whether the buyer wants to apply a price reduction or a temporary partial suspension.<sup>86</sup> Consequently, a notification of the price reduction remedy by means of a declaration is obligatory, in the case of an extrajudicial price reduction.

A second question is whether the buyer has to do the declaration of the price reduction *before* he actually exercises the price reduction, or is it sufficient to notify the seller *on the moment* he actually exercises the price reduction? This question is of importance especially if the buyer has not yet paid. If the buyer has already paid the price, he must, in any case, ask the seller to apply the price reduction remedy *beforehand*.

Shin raises an interesting question; is the buyer *obliged* to do a separate declaration of price reduction *before* he actually reduces the price?<sup>87</sup> A first position, supported by the *Oberlandesgericht* of Munich, Germany in a judgment of 2 March 1994, and part of the legal doctrine, answers this question positively.<sup>88</sup> The buyer that has not yet paid must, according to this position, make a *separate declaration* to the seller, *before* actually applying the price reduction by refusing to pay a part of the price. The opposite position, supported by Shin, claims that such an interpretation must be rejected.<sup>89</sup> The historical development of the price

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<sup>83</sup> *Potatoes case I*, No. 16 U 57/05.

<sup>84</sup> Art. 40 CISG: ("The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer"). With regard to third party claims see Art. 43(2) and 44 CISG. See also Kruisinga, *supra* note 22, at 64 and 104-121.

<sup>85</sup> See also *Windows frames case*, No. C/12709/2001 (a prior declaration/notice is necessary: "must be communicated to the seller before it takes effect", but the price reduction can also be asked judicially).

<sup>86</sup> Bach, *supra* note 4, at 756-757; Müller-Chen, *supra* note 4, at n° 4. Accord Schnyder & Straub, Art. 50, *supra* note 4, at n° 27 (2010).

<sup>87</sup> Chang-Sop Shin, *Declaration of Price Reduction Under the CISG Article 50 Price Reduction Remedy*, 25 J.L. & COM. 349, 349-352 (2005-06). See also Bergsten & Miller, *supra* note 4, at 263 (mention a: "declaration of avoidance of contract by notice").

<sup>88</sup> See *Coke case*, No. 7 U 4419/93 (OLG Munich March 2, 1994) (Germany), translation available at [cisgw3.law.pace.edu/cases/940302g1.html](http://cisgw3.law.pace.edu/cases/940302g1.html); *Granular plastic case*, No. OR.98.00010 (HG [Handelsgericht] Aargau June 11, 1999) (Switzerland), translation available at [cisgw3.law.pace.edu/cases/990611s1.html](http://cisgw3.law.pace.edu/cases/990611s1.html); *Windows frames case*, No. C/12709/2001 (a prior declaration is necessary: "must be communicated to the seller before it takes effect", but the price reduction can also be applied if the buyer claims it before a court). See also Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, *supra* note 4, at n° 4.4; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 130-131. Cf. Müller-Chen, *supra* note 4, at 772-773, n° 4 (seems to have the same opinion).

<sup>89</sup> Shin, *supra* note 87, at 349-352. See also Gonzalez, *supra* note 5, 92 (note 82); Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 313.2; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at n° 313.2; Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.2.1.



reduction remedy under Article 50 CISG would – according to its supporters – justify this position.<sup>90</sup> Earlier versions of Article 50 CISG expressly stated that the buyer has to make a 'declaration' of price reduction. To avoid this interpretation, the Diplomatic Conference would have deleted these words. Another argument is that the wording of Article 50 CISG does not require a separate 'declaration'.

Even if we adhered to the second position (which does not require a *separate* price reduction declaration), the buyer would still have to notify the seller about the price reduction remedy by means of a declaration *on the moment he exercises his right to reduce the price*. It is not a declaration that has to be done *before* the buyer exercises his right to reduce the price. It has to be understood as an 'accompanying' declaration, which explains that the seller exercises the price reduction remedy by paying a reduced price.<sup>91</sup> It is clear that such a declaration is desirable and will enhance legal certainty.

What can we conclude from that? If the buyer has not yet paid the price and wishes to apply a price reduction, he must notify the seller at least *at the moment he exercises the price reduction* by means of a declaration. If the buyer has already paid the price, he must make a declaration *before* he can exercise his right to reduce the price. Indeed, he must make clear he wishes to apply a price reduction.

What about the *content* and *form* of the price reduction declaration? First and foremost, this declaration must make clear that the buyer wishes to exercise a price reduction.<sup>92</sup> It is not necessary to mention the specific term 'price reduction'.<sup>93</sup> Further, it is not necessary to state the exact amount of the price reduction in the declaration.<sup>94</sup> As stated before, the mere payment of a reduced amount or price will not suffice because it is not clear whether the buyer wants to apply the price reduction remedy or a temporary (partial) suspension (see also *supra*).<sup>95</sup> Furthermore, there are no specific requirements with regard to the price reduction declaration.<sup>96</sup>

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<sup>90</sup> For the adopted proposal for amendment of the UK (which replaces the wording "*the buyer may declare the price to be reduced*" by "*is entitled to reduce the price*"), see: UN Doc. A/CONF.97/C.1/L.169. See also the discussion in the first committee: Official Records, Summary records of meetings of the First Committee, 23rd meeting, 359-360 and <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, UN. Doc. A/CONF.97/11, <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

<sup>91</sup> See also Bergsten & Miller, *supra* note 4, at 263 (mention a "*declaration by notice*" that can take place (immediately) by means of a claim or a defense before a court); Van Der Velden, *supra* note 5, at 347 ("*Volstaan kan dus worden met een mededeling bij de betaling van de koopprijs, dat een vermindering is toegepast of daarvoor gekozen is*").

<sup>92</sup> Bach, *supra* note 4, at 756; Huber & Mullis, *supra* note 5, at 250; Magnus, *supra* note 5, at n° 16; Müller-Chen, *supra* note 21, at 772, n° 4; Schnyder & Straub, *Art. 50, supra* note 21, at n° 26 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 26 (2010).

<sup>93</sup> Bach, *supra* note 4, at 756.

<sup>94</sup> Magnus, *supra* note 5, at n° 16; Müller-Chen, *supra* note 4, at 772, n° 4. But see Bach, *supra* note 4, at 757 (the claim has to be sufficiently specific – according to the majority of legal systems – if the price has already been paid); Schnyder & Straub, *Art. 50, supra* note 21, at n° 26 (1997) (the buyer may express first his wish to reduce the price without calculating the exact amount of the reduction, but afterwards the amount of the price reduction has to be notified by the buyer); Schnyder & Straub, *Art. 50, supra* note 4, at n° 26 (2010) (*idem*). *Contra Windows frames case*, No. C/12709/2001 (the judge is of the opinion that the buyer has to specify the amount of the price reduction during the judicial proceedings); *GSM modules case*, No. A3 2006 79 (Kantonsgericht Zug August 30, 2007) (Switzerland), translation available at [cisgw3.law.pace.edu/cases/070830s1.html](http://cisgw3.law.pace.edu/cases/070830s1.html) (the buyer cannot apply his right to reduce the price because he did not specify the amount of the price reduction).

<sup>95</sup> Bach, *supra* note 4, at 756-757; Müller-Chen, *supra* note 4, at n° 4. Accord Schnyder & Straub, *Art. 50, supra* note 4, at n° 27 (2010).

<sup>96</sup> Huber & Mullis, *supra* note 5, at 250; Magnus, *supra* note 5, at n° 15; Schnyder & Straub, *Art. 50, supra* note 21, at n° 27 (1997) (orally or written); Schnyder & Straub, *Art. 50, supra* note 4, at n° 27 (2010) (*idem*).

Even if it is not formally required to use the term 'price reduction', the buyer has to be cautious. It is advisable that the buyer makes it clear to the seller in the declaration that he '*definitively refuses to pay part of the price*'. The price reduction declaration may not raise any doubt about the fact that the buyer wishes to apply the price reduction as a *definite* remedy. It is also acceptable that the buyer has to describe his motivation in the declaration of why he wishes to apply the price reduction unilaterally.<sup>97</sup> For that reason, the buyer has to specify precisely the shortcomings in the obligations of the seller, which would justify a price reduction. Summarized, the *intention* to apply the price reduction remedy and the *motivation* thereof, are two essential elements of the price reduction declaration. These two substantive requirements will enable the judge to examine this declaration *a posteriori* (see *infra*, §2.c).<sup>98</sup>

Another question, with regard to the price reduction declaration, is *how this declaration actually works*. The (extrajudicial) price reduction declaration has effect as from the moment the buyer has sent it to the seller and alters, according to the majority of doctrine, immediately the contract.<sup>99</sup> The *transmission* of the unilateral declaration is at the risk of the seller: even if the declaration does not arrive, this does not deprive the buyer of the right to rely on the declaration.<sup>100</sup>

#### *e) Extra period of time for performance after notification*

The question arises whether the buyer must give the seller an extra period of time to perform, *after the notification of non-conformity* or *after the price reduction declaration*.

I must stress in this regard the *subsidiary* character of the price reduction remedy. Articles 37 and 48 CISG prescribe the seller's right to cure (see *supra*, II.§5).

Does the seller's right to cure require that the buyer must give the seller an extra period of time to perform after the notification of non-conformity or after the price reduction declaration? This is not how the commentators of the CISG see it.<sup>101</sup> They believe that the seller's right to cure *takes precedence* apart from who has acted first.<sup>102</sup> If the seller first offers performance, within the framework of his right to cure, the buyer is not allowed to make a price reduction declaration.<sup>103</sup> But if the buyer first makes a price reduction declaration to the seller and the latter offers performance, then within the framework of his right to cure, the declaration of the buyer will have no effect.<sup>104</sup> Doctrine explains this by means of the figure of the '*resolutive condition*': the declaration of the buyer shall have temporary effect, but the effectiveness will cease if the seller offers to perform and is successful.<sup>105</sup> This means that the

<sup>97</sup> For the same reasoning in the case of a unilateral termination of a contract in exceptional circumstances in Belgium see S. STIJNS, DE GERECHTELIJKE EN DE BUITENGERECHTELIJKE ONTBINDING VAN OVEREENKOMSTEN n° 487 (1994).

<sup>98</sup> For the same reasoning in the case of unilateral termination of a contract in exceptional circumstances in Belgium see Stijns, DE GERECHTELIJKE EN DE BUITENGERECHTELIJKE ONTBINDING VAN OVEREENKOMSTEN, *supra* note 97, at n° 487.

<sup>99</sup> Will, *supra* note 4, at 372, n° 2.1.3. Accord Bach, *supra* note 4, at 757; Huber & Mullis, , 250. Contra Benicke, *supra* note 20, at n° 14.

<sup>100</sup> Art. 27 CISG. Accord Will, *supra* note 4, at 372, n° 2.1.3. See also Bach, *supra* note 4, at 757; Huber & Mullis, *supra* note 5, at 250; Neumayer & Ming, *supra* note 40, at 355; Magnus, *supra* note 5, at n° 15; Schnyder & Straub, Art. 50, *supra* note 21, at n° 29 (1997).

<sup>101</sup> Bach, *supra* note 4, at 756; Huber & Mullis, *supra* note 5, at 249; Müller-Chen, *supra* note 4, at n° 7.

<sup>102</sup> Huber & Mullis, *supra* note 5, at 249.

<sup>103</sup> Huber & Mullis, *supra* note 5, at 249.

<sup>104</sup> Huber & Mullis, *supra* note 5, at 249. See also Neumayer & Ming, *supra* note 40, at 358.

<sup>105</sup> Huber & Mullis, *supra* note 5, at 249. See also Bach, *supra* note 4, at n° 28; Müller-Chen, *supra* note 4, at n° 7; Neumayer & Ming, *supra* note 40, at 358 ("Au cas où le vendeur effectue une nouvelle livraison ou une réparation des défauts dans le

seller's right to cure does *not* require that the buyer must give the seller an extra period of time to perform neither after the notification of the non-conformity nor after the declaration of price reduction.<sup>106</sup> However, Article 47 CISG provides the possibility for the buyer to grant the seller *voluntary* such an extra period of time, to ensure afterwards the application of remedies, such as a price reduction.<sup>107</sup>

#### *f) Anticipatory price reduction*

Some authors hold the opinion that the buyer can apply the price reduction *before* the goods are delivered in non-conformity.<sup>108</sup> The buyer would not have to wait until the effective delivery of the goods takes place if in advance it is clear that the seller will deliver defect goods and will not be able to repair them. According to this doctrine, this can be inferred from the general principle of anticipatory breach under Article 72(1) CISG.

#### *g) Alternation of the buyer's choice*

Does the buyer have the possibility, after he has chosen the price reduction remedy, of altering his choice and to choose another remedy?

As indicated before, the extra-judicial price reduction *declaration* has an effect, as from the moment the buyer has *sent* it to the seller and alters immediately the contract the (see also *supra*, d). The transmission of the unilateral declaration is at the risk of the seller, even if it does not arrive with the seller, it will have effect (Art. 27 CISG; see also *supra*, d). This price reduction declaration is binding upon the buyer.<sup>109</sup> Consequently, the buyer loses – according to some authors – the right to choose another remedy.<sup>110</sup> This means that an alternation of the buyer's choice (to e.g. termination or performance of the contract) is not possible anymore. Other authors support the opinion that a change of choice would be possible in certain circumstances.<sup>111</sup> Müller-Chen grants the buyer the possibility to change its prior choice for a price reduction in the following situations. A change of choice is possible if the seller is not aware of the price reduction declaration because he has not received it, or if the seller does not

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délai fixé conformément aux articles 37 ou 48, la réduction du prix qui a déjà été déclarée perd sa validité ex tunc"); Schnyder & Straub, Art. 50, *supra* note 21, at n° 22 (1997); Schnyder & Straub, Art. 50, *supra* note 4, at n° 22 (2010). See also Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 43 ("If the seller subsequently remedies his failure to perform or is not allowed by the buyer to remedy that failure, the "declaration of reduction of the price is of no effect").

<sup>106</sup> *Contra Racing carts case*, No. 3 O 196/01 ("Insofar, [Buyer] was obliged to set an additional period of time for removal of defects to be allowed to exercise its rights [such as a price reduction] due to a breach of contract on [Seller]'s part (Art. 47(1), (2) CISG)").

<sup>107</sup> The following author believes that it is appropriate for the buyer to grant the seller an extra period of time for performance. As a result the buyer can apply a price reduction after the expiration of the period of time: Magnus, *supra* note 5, at n° 29. Accord Benicke, *supra* note 20, at n° 6.

<sup>108</sup> Bach, *supra* note 4, at 751-752; Müller-Chen, *supra* note 4, at 772. See also Benicke, *supra* note 20, at n° 3; Magnus, *supra* note 5, at n° 12.

<sup>109</sup> Müller-Chen, *supra* note 4, at 773, n° 4.

<sup>110</sup> Will, *supra* note 4, at 372, n° 2.1.3; Schnyder & Straub, Art. 50, *supra* note 21, at n° 31 (1997) (independent from the fact whether or not it is a "Gestaltungsrecht"); Schnyder & Straub, Art. 50, *supra* note 4, at n° 31 (2010) (*idem*). Seems to support the same opinion: Van Der Velden, *supra* note 5, at 346.

<sup>111</sup> Is very critical about the view that excludes the alternation of the buyer's choice as a matter of principle, but does not clearly state his own opinion: Bach, *supra* note 4, at 757.

alter his position after receipt of the declaration and does not agree with a price reduction.<sup>112</sup> Benicke states more generally that if the seller does not agree with the price reduction or with the amount of the price reduction, the buyer can still change its choice and choose another remedy.<sup>113</sup> This author also states that if the buyer desires a price reduction and the seller does not agree with it, the buyer will benefit from a change of choice. As a result, the seller will not be kept in a state of uncertainty with regard to the proposed remedy by the buyer.

Stijns theory, which has been developed in the context of the European consumer sales remedies, can now be applied.<sup>114</sup> She differentiates between remedies which are, on the one hand applied *judicially* and on the other hand those which are applied *extra-judicially*. If the buyer invokes the price reduction remedy *extra-judicially*, by means of a declaration, it does not allow any change of choice by the buyer. In case of a *judicial* procedure, the buyer may, according to this theory, choose for another remedy because the fact that there is a judicial procedure means that there is a conflict about the applicable remedies between the parties, and that the final remedy will be imposed by the judgment. In case of a judicial procedure the buyer can always change his choice for a remedy and this can be, as stated by Benicke, beneficial for both parties and for the course of the proceedings. In case of an *extrajudicial* price reduction, the declaration is constitutive. This is not the case for a *judicial* claim or defense invoking a price reduction.

## § 2. The role of the judge

### *a) In principle an extrajudicial price reduction*

We have already discovered that the price reduction will be, in principle, applied unilaterally by the buyer without prior intervention of a judge (see *supra*, §1.b). This means that the role of the judge will often be restricted to so-called 'conflict situations'. However, the role of the judge may not be minimized because the unilateral character of the price reduction is often an 'illusion' (see *supra*, §1.b). The seller will often disagree with the amount of price reduction or with the finding of non-conformity. Those conflicts will often cause the intervention of a judge. Nevertheless, these conflicts do not always rule out a unilateral or an extra-judicial price reduction. The role of the judge is often reduced to an intervention *a posteriori* (see *supra*, §1.b). In many situations however, a *prior* intervention of the judge is needed. This is the case if the buyer has already paid the price and the seller refuses to co-operate with a price reduction and refuses to pay back a part of the price,<sup>115</sup> or if the seller claims the whole price before court and the buyer defends himself by stating for the first time that he is entitled to a price reduction.

I have tried, by means of an extensive study of case law, to single out the cases where the judge operates an *a posteriori* examination because the buyer applied an *extrajudicial, unilateral* price reduction. I tried to separate them from the cases where the judge operates an *a priori* examination when then buyer applies a *judicial* price reduction. Unfortunately, the facts of many judgments did

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<sup>112</sup> For this opinion see Müller-Chen, *supra* note 4, at 773, n° 4. Is also of the opinion that the buyer can change his choice for a price reduction if the seller is not aware of the price reduction declaration because he has not received it: Magnus, *supra* note 5, at n° 15.

<sup>113</sup> Benicke, *supra* note 20, at n° 14 (according to this author the price reduction is no '*Gestaltungsrecht*').

<sup>114</sup> S. Stijns, *De consumentenkoop: actuele knelpunten*, in *KNELPUNTEN VERKOOP ROERENDE GOEDEREN* 21, n° 60 (A. Verbeke & B. Tilleman eds., 2009).

<sup>115</sup> About this aspect see Williams, *supra* note 73, at IV.C.5.

not allow being certain whether it was a 'judicial' or an 'extrajudicial' price reduction. Only in some exceptional cases the facts or the decision of the judge allowed to do this assessment. The facts of a judgment of the Amtsgericht in Cloppenburg, Germany, of 14 April 1993 were sufficiently clear to determine that a buyer had carried out an extrajudicial price reduction.<sup>116</sup> This case was about the delivery of a defect used agricultural mower and the buyer only paid a part of the price because of this defect. The partial payment was accompanied with a letter which explained why the buyer reduced the price. Therefore, we can clearly establish that this is an application of an extrajudicial price reduction. In many cases it is unclear whether the buyer has unilaterally reduced the price. A buyer often declares that he does not accept the invoice because of non-conformity,<sup>117</sup> that he refuses to pay a part of the price<sup>118</sup> or that he wishes a *credit note* because of non-conformity<sup>119</sup>. However, I have indicated before (see *supra*, §1.d), that it must be clear that the buyer 'definitively refuses to pay a part of the price'. I believe that this is only the case if the buyer claims a credit note because of non-conformity.

## b) Prior examination by the judge

In case of an *a priori* intervention, the judge must – in every case – examine the conditions of application of Article 50 CISG. The judge must examine for example whether or not the buyer has respected the hierarchy of remedies<sup>120</sup> and the time limits for the notification of non-conformity of the good.

The aspect whether the buyer has to exercise his rights having regard to the principle of the '*prohibition of abuse of rights*' or the principle '*good faith*' is not explicitly treated under the CISG. Consequently, a possible '*prohibition of abuse of rights*'-examination or a '*good faith*'-examination of the judge in this regard has not yet been fleshed out. Nevertheless, Article 7 CISG states that in the interpretation of the Convention, the observance of '*good faith*' in international trade has to be, amongst others, taken into account. However, the opinions about the interpretation and the scope of '*good faith*' in the CISG are divergent.<sup>121</sup> Therefore it is

<sup>116</sup> *Used agricultural machine (mower) case*, No. 2 C 425/92 (AG [Amtsgericht] Cloppenburg April 14, 1993) (Germany), translation available at <http://cisgw3.law.pace.edu/cases/930414g1.html>.

<sup>117</sup> *E.g. Coffee machines case*, No 3 Ob 193/04k.

<sup>118</sup> *E.g. Diaper machine case*, No. CISG/1996/36.

<sup>119</sup> *E.g. Tomatoes case*, 2002-03 RW 1351.

<sup>120</sup> About the fact the price reduction is subordinate to the seller's right to cure and about the examination of the judge see *Furniture case*, No. 6252 (but a price reduction for the second part of the goods is nevertheless possible); *Acrylic blankets case*, No. 2 U 31/96 (with regard to termination and price reduction; price reduction cannot be applied); *Canned food case 2*, No. S 97/324 (but in this case a price reduction was nevertheless possible); Russia Arbitration proceeding, No. 126/2004 (the price reduction remedy was not allowed because the seller replaced the defect goods).

<sup>121</sup> For an overview of the scope of good faith under the CISG see Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 1 VINDOBONA JOURNAL 15, 15-40 (1999) (is in favour of a broad scope of application). See also Franco Ferrari, *Art. 7, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT* 157, n° 25-27 (P. Schlechtriem & I. Schwenzer eds., 2008) (good faith is not merely a means to interpret the Convention but also plays a role in the interaction between the parties if an element is not expressly regulated by the CISG); Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION*, *supra* note 10, at 133-136 (good faith has only an interpretative function); JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG* 37-39 (2008) (is in favour of a broad principle of good faith that not only governs the interpretation of the CISG, but also obliges the parties to act in good faith); U. Magnus, *Art. 7 CISG, in VON STAUDINGERS KOMMENTAR ZUM BGB, WIENER UN-KAUFRECHT* 165, n° 10 and 24 et seq. (M. Martinek ed., 2004) (is in favour of a broad principle of good faith both for the interpretation of the Convention as for the interaction between parties); Neumayer & Ming, *supra* note 40, at 102 (the principle of good faith is applicable to the interpretation of the Convention and to the behaviour of the parties); PETER SCHLECHTRIEM & CLAUDE WITZ, *CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES* n° 78 and 83 (2008) (the principle of good faith governs the interpretation of the CISG and can be used in case of lacunas); Pilar Perales Viscasillas, *Art. 7, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 111, n° 21-30 (Stefan Kröll, et al. eds., 2011) (is in favour of a broad interpretation of the principle of good faith).

uncertain whether the judge may examine the buyer's demand for price reduction having regard to the principle of prohibition of abuse of rights or the principle of good faith.

*c) A posteriori examination by the judge*

If the buyer reduces the price *extra-judicially*, an *a posteriori* examination of the judge can take place if the seller so requests. The judge must, similarly to the *a priori* examination, examine the conditions of application of Article 50 CISG. The judge can also examine the amount of the applied price reduction if this is disputed among the parties. It is also uncertain in case of an *a posteriori* examination of the judge whether the judge may examine the buyer's price reduction declaration having regard to the principle of prohibition of abuse of right or the principle of good faith, based on Article 7 CISG.

## IV. CALCULATION OF THE PRICE REDUCTION

### § 1. Proportional calculation method

Article 50 CISG prescribes a calculation method which has also been adopted by many European (soft law) instruments (such as the PECL,<sup>122</sup> the DCFR, and the CESL).<sup>123</sup>

It is a 'proportional calculation method': the price reduction is proportional to the reduction in value of the goods not in conformity compared to the value of goods in conformity.<sup>124</sup> This proportional calculation method will not necessarily come down to the costs of the reparation of the good.<sup>125</sup> Doctrine often makes reference to the formula of Will to calculate the price reduction under Article 50 CISG:<sup>126</sup>

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<sup>122</sup> See also Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, *supra* note 4, at n° 5.1.

<sup>123</sup> About these instruments see *supra*, notes 6 and 7.

<sup>124</sup> About the proportional character of price reduction see *Furniture case*, No. 6252 (with a reproduction of the formula of Will); *Marble slabs case*, No. 6 R 194/95 (OLG Graz Nov. 9, 1995) (Austria), translation available at [cisgw3.law.pace.edu/cases/951109a3.html](http://cisgw3.law.pace.edu/cases/951109a3.html); *Art books case*, No. HG 970238.1 (HG Zürich Feb. 10, 1999) (Switzerland), translation available at [cisgw3.law.pace.edu/cases/990210s1.html](http://cisgw3.law.pace.edu/cases/990210s1.html) (the proportional calculation of the price reduction requires that the buyer shows that the goods have been reduced in value); *Window frames case*, No. C/12709/2001 ("The price can be reduced only on a pro rata basis, using the appropriate method, without taking into consideration the repair costs"); Russia Arbitration proceedings, No. 97/2004 (Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Dec. 23, 2004), translation available at [cisgw3.law.pace.edu/cases/041223r1.html](http://cisgw3.law.pace.edu/cases/041223r1.html) (the proportional character of the price reduction remedy is mentioned but curiously the percentage of the reduction has to be, according to the arbitrators, determined by the *lex mercatoria*); *Poppy seed case*, No. 43 Cg 34/05f (this case stresses the relative character of the price reduction); *Dashboard mould case*, No 2010/AR/3455 (with a reproduction of the formula).

<sup>125</sup> Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, *supra* note 4, at n° 5.1; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 133. E.g. *Window frames case*, No. C/12709/2001 ("The price can be reduced only on a pro rata basis, using the appropriate method, without taking into consideration the repair costs").

<sup>126</sup> Will, *supra* note 4, at 372. See also Bach, *supra* note 4, at 758-759; Heuzé, *supra* note 28, at n° 458; Huber & Mullis, *supra* note 5, at 252; Jansen, *supra* note 52, at 205; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, *supra* note 4, at n° 5.1; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 132; Magnus, *Art. 50 CISG*, *supra* note 5, at n° 19; Müller-Chen, *supra* note 4, at 774, n° 8; Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.2.2; Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 33 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 33 (2010); Stijns & Van Ransbeeck, *De rechtsmiddelen (algemeen)*, 204. The following author seems to use the same calculation method but uses instead of the term 'reduced price'

$$\frac{\text{Stipulated price}}{\text{Reduced price}} = \frac{\text{Value of conforming goods}}{\text{Value of non - conforming goods}}$$

$$\text{Reduced price} = \frac{(\text{Value of non - conforming goods} \times \text{stipulated price})}{\text{value of conforming goods}}$$

Also case law refers to this formula. The Swiss District court of Locarno Campagna mentions explicitly this formula in a judgment of 27 April 1992: "*Pursuant to well-settled case law, reduction of the price is performed in accordance with the following formula: reduced price: convened price = objective value of the non-conforming goods: value of conforming goods*".<sup>127</sup> A very recent judgment of the Belgian Court of Appeal of Antwerp mentions explicitly this formula too: 'After the finding of non-conformity and the timely notification under the Articles 38 and 39 CISG, the buyer can reduce the price according to the following formula (value of the delivered goods x contract price)/(value of the goods that should have been delivered, if they were delivered in conformity)'. Moreover, the judge reopens the proceedings to allow the buyer to state on the amount of the claimed price reduction by means of a 'detailed calculation' based on the 'aforementioned formula'.<sup>128</sup>

## § 2. Time of calculation

It is clear that the price reduction under the CISG is calculated *at the time of delivery*.<sup>129</sup> In principle, Article 31 CISG specifies the concept of 'time of delivery'.<sup>130</sup> Also for the PECL, the DCFR, and the CESL the time of delivery has to be taken into consideration for the calculation of the price reduction. This is different from the calculation method in Article 46 ULIS<sup>131</sup>, which mentions the *moment of the conclusion of the contract*. Article 46 draft-CISG, about the price reduction, adopted the time of calculation of the ULIS.<sup>132</sup> The Norwegian Delegation, however, suggested changing the time of calculation of the price reduction.<sup>133</sup> As

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the misleading term 'amount of recovery'. This is only correct if he means the 'reduced price' and not the price reduction itself: Kritzer, *supra* note 21, at 377.

<sup>127</sup> *Furniture case*, No. 6252.

<sup>128</sup> *Dashboard mould case*, No 2010/AR/3455.

<sup>129</sup> About the importance of the time of the calculation see Will, *supra* note 4, at 370. See also *Marble slabs case*, No. 6 R 194/95; *Dashboard mould case*, No 2010/AR/3455.

<sup>130</sup> Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 39 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 39, 39a and 39c (2010); Williams, *supra* note 73, at IV.C.5. See also Müller-Chen, *supra* note 4, at 775-776, n° 9-11 (nuanced; it is not always desirable to refer to the point of time in Article 31 CISG for the calculation of the price reduction because of the fact that delivery and transfer of risk do not always take place at the same moment. This author suggests considering the moment on which the buyer *disposes* of the goods). *Accord Bottles case*, No. 2 U 923/06 (in case of distance sales, the 'time of delivery' is supposed to be the moment on which the goods arrive at the destination)). *Contra* this last differentiation Bach, *supra* note 4, at 760-761; Benicke, *supra* note 20, at n° 11; Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 37-39 (1997). See generally Huber & Mullis, *supra* note 5, at 253.

<sup>131</sup> Art. 46 of the 'Convention relating to a Uniform Law on the International Sale of Goods' (ULIS), The Hage, 1 July 1964: 'Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.' (Underlining added).

<sup>132</sup> See Bergsten & Miller, *supra* note 4, at 259.

<sup>133</sup> For the proposal of the amendment by Norway see UN Doc. A/CONF.97/C.1/L.167. See also the discussion in the first commission: Official Records, Summary records of meetings of the First Committee, 23rd meeting, at 357-358 and <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also Report of the First Committee, UN. Doc. A/CONF.97/11, <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

a consequence, the final version of Article 50 CISG, takes *the time of delivery* into consideration. Two reasons are put forward to do away with the time of the conclusion of the contract.<sup>134</sup> A first argument is that the goods do not exist at the moment of conclusion of the contract, which makes it difficult to assess the value of the (non-)conforming goods. Another argument is that if the price reduction is calculated at the moment of delivery, the same figures can be used for the calculation of damages.<sup>135</sup>

Because the calculation takes place at the moment of delivery, we must assess the influence of an increase in market price (value) or a decrease in market price between the conclusion of the contract and the time of delivery. We can come to the conclusion that the price reduction will not vary if the market price of both conforming and non-conforming goods rise, fall or remains the same (see example 1). But if both market prices rise or fall differently, the result will vary (see example 2). I refer to WILLS examples.<sup>136</sup>

Example 1: The price reduction will correspond to 50 if the seller agrees to deliver n° 1 corn and delivers n° 3 corn of a lower quality and the market prices are 200 and 150. The price reduction will also correspond to 50 if both market prices have risen (e.g. with 20 %) or fallen (e.g. with 60 %) or have remained the same.<sup>137</sup>

Example 2: The price reduction will correspond to zero if the market price of n° 1 corn has risen at the moment of delivery with 20% and of n° 3 corn with 60%.<sup>138</sup> The price reduction will correspond to 125 if, on the contrary, the market price of n° 1 corn has fallen with 20% and n° 3 corn with 60%.<sup>139</sup>

The last example shows that a difference in the decrease or increase in market price of the two types of corn influences the price reduction.

If I put the data of both examples in the formula and add a possible variation of the market price between the conclusion of the contract and the moment of delivery (in %), the following formula appears. We have to take into consideration the following variable amounts: x = reduced price; y = absolute percentage of the rise (+) or fall (-) of the market price (market value) of non-conforming goods (n° 3 corn) and z = the absolute percentage of the rise (+) or the fall (-) of the market price (market value) of conforming goods (n° 1 corn).

<sup>134</sup> About the two reasons see Gonzalez, *supra* note 5, 93-94; Will, *supra* note 4, at 369-370. About the first reason see Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 313; Van Der Velden, *supra* note 5, at 348. See also Martin L. Ziontz, *A New Uniform Law for the International Sale of Goods: Is It Compatible with American Interests?*, 2 NW. INT'L L. & BUS. 129, 171 (1980) (mentions that the *Draft Convention* of 1978 takes into account the moment of the conclusion of the contract for the calculation of the price reduction, whilst damages are calculated at the moment of delivery).

<sup>135</sup> However, in Belgium, damages are calculated at the moment of the judgement.

<sup>136</sup> Will, *supra* note 4, at 370. For another example see: Gonzalez, *supra* note 5, 94.

<sup>137</sup> Calculation: if both market prices remain the same: reduced price = (value non-conforming good (150) X agreed price (200))/(value conforming good (200)) = 150 (price reduction = 50); if the market price rises with 20%: reduced price = (value non-conforming good (180) X agreed price (200))/(value conforming good (240)) = 150 (price reduction = 50); if the market price falls with 60%: reduced price = (value non-conforming good (60) X agreed price (200))/(value conforming good (80)) = 150 (price reduction = 50).

<sup>138</sup> Calculation: reduced price = (value non-conforming good (240) X agreed price (200))/(value conforming good (240)) = 200 (price reduction = 0).

<sup>139</sup> Calculation: reduced price = (value non-conforming good (60) X agreed price (200))/(value conforming good (160)) = 75 (price reduction = 125).



$$(x) = \frac{\left( \left( \left( \frac{y}{100} \times 150 \right) + 150 \right) \times 200 \right)}{\left( \left( \frac{z}{100} \times 200 \right) + 200 \right)}$$

We can deduce from this that the moment of calculation of the price reduction effectively plays a role. The final result will be different when we compare a calculation at the moment of the conclusion of a contract and at the moment of delivery. In this last case the outcome will differ if the market prices (market value) of conforming and non-conforming goods rise or fall differently. This (unequal) decrease or increase in market price will not play a role in a calculation at the moment of the conclusion of the contract.

Will believes that this calculation method entails a fair distribution of risks and chances.<sup>140</sup> If the market price of non-conforming goods rises disproportionately in comparison to conforming goods, the buyer will hold, at the time of delivery, goods with a higher market value but with an inferior quality. If the buyer chooses to benefit of the higher market value, the price reduction will be lesser or can even be zero.<sup>141</sup> If the market value of non-conforming goods falls disproportionally in comparison to conforming goods, the buyer does not hold only goods of an inferior quality but also goods with a lower market value. If the buyer accepts the non-conforming goods, it is only fair that the amount of the price reduction will be more considerable.

### § 3. Place of calculation

The CISG does not clarify the question *where* the values of the (non-)conforming goods have to be calculated.<sup>142,143</sup> Indeed, the value of goods in Bangkok can differ dramatically from the value of the same goods in Paris. Different solutions have been put forward by legal doctrine.<sup>144</sup> Some authors propose a three-step solution.<sup>145</sup> Initially, the value of the goods of the first *destination* of the goods should be considered. If this solution does not work, the place of *delivery* of the non-conforming goods should be considered. As a final solution, this authors suggest a *catchall* place which implies that the buyer can choose between the place of business, the buyer or the seller. Another part of doctrine thinks that only the place of *destination* of the goods has to be taken into account.<sup>146</sup> Some other authors defend in

<sup>140</sup> Will, *supra* note 4, at 371.

<sup>141</sup> Schlechtriem suggests that the buyer loses the advantages of a profitable purchase, which is not the case under German sales law: Schlechtriem, UNIFORM SALES LAW. THE UN-CONVENTION ON CONTRACTS AND INTERNATIONAL SALE OF GOODS, *supra* note 121, at 79.

<sup>142</sup> Mention the problems, but does not treat the problems in detail: Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.2.2; Sondahl, *supra* note 5, at n° A.3. Very detailed, but do not take a stance Bach, *supra* note 4, at 761; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 140-141.

<sup>143</sup> For a proposal about the place of calculation of price reduction by Argentina, Spain and Portugal, which was not adopted, see UN Doc. A/CONF.97/C.1/L.168. For the discussions in the first committee see Official Records, Summary records of meetings of the First Committee, 23rd meeting, 358-359 and <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting23.html>. See also: Report of the First Committee, UN. Doc. A/CONF.97/11, <http://www.cisg.law.pace.edu/cisg/1stcommittee/summaries50.html>.

<sup>144</sup> For a detailed overview of all the points of view see Schnyder & Straub, *Art. 50, supra* note 21, at n° 40-43 (1997).

<sup>145</sup> Piliounis, *supra* note 4, at 34; Will, *supra* note 4, at 374-375, n° 3.3.

<sup>146</sup> Benicke, *supra* note 20, at n° 12; Schnyder & Straub, *Art. 50, supra* note 21, at n° 41 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 41 (2010).

principle the place of *delivery* of the non-conforming goods.<sup>147</sup> Unfortunately, case law is equally non conclusive.<sup>148</sup>

#### § 4. Price reduction until zero

Part of doctrine and case law defends that if the delivered goods are worthless, the seller should, within the framework of price reduction, reimburse the entire price.<sup>149</sup> Price reduction until zero is not subject to the conditions of application of termination.<sup>150</sup> This means that the buyer can keep the useless good, while this is not possible in case of termination because of the restitution duties.<sup>151</sup> However, some authors defend, albeit incorrectly, that the application of price reduction until zero also requires the fulfillment of the conditions of application of termination.<sup>152</sup> Price reduction until zero will be very useful to the buyer precisely when termination of the contract is no longer possible (e.g. in the case of exceeding the time limits under Art. 49(2) CISG) (see also *supra*, II.§3).<sup>153</sup>

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<sup>147</sup> Enderlein, *Rights and Obligations of the Seller under the UN Convention on Contracts for the International Sale of Goods*, *supra* note 70, at 197 (but this author does not rule out that the buyer would prefer to take the place of destination into account). See for the same opinion: Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 141; Van Der Velden, *supra* note 5, at 348. See also Huber & Mullis, *supra* note 5, at 253 (these authors prefer the place of delivery, but for goods that need transportation, the place of destination will be taken into account); Magnus, *Art. 50 CISG*, *supra* note 5, at n° 22 (takes, in principle, the place of delivery into account, but for goods that need transportation, the place of destination will be taken into account); Müller-Chen, *supra* note 4, at 776-777, n° 12 (this author takes the place of destination into account for goods that need transportation and for every other case the place of delivery as defined by Article 31(b) and (c) CISG. This means that in the case of a sale where the buyer must pick up the good, the place where the goods are at the buyer's disposal will be relevant and in the case the seller must deliver the goods, the place of destination will be relevant).

<sup>148</sup> See *Marble slabs case*, No. 6 R 194/95 (place of delivery); *Waste container case*, No. Vb 94131 ("at the place where the goods are being directed that the seller knows of; or in accordance to the price level at the place where the buyer is situated").

<sup>149</sup> For this opinion, see Bach, *supra* note 4, at 761; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 135-138; Magnus, *Art. 50 CISG*, *supra* note 5, at n° 23; Müller-Chen, *supra* note 4, at 777, n° 13; Schlechtriem & Butler, *UN LAW ON INTERNATIONAL SALES*, *supra* note 42, at n° 202; Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 45-46 (2010) (these authors defend another opinion in the edition of 1997). See also *Coffee machines case*, No 3 Ob 193/04k (very detailed). For a translation of this case in English see Schwenzer, et al., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG*, *supra* note 22, at 407-409. See also *Shoes case 2*, No. 3 C 75/94 (AG [Amtsgericht] Nordhorn June 14, 1994) (Germany), translation available at [cisgw3.law.pace.edu/cases/940614g1.html](http://cisgw3.law.pace.edu/cases/940614g1.html); *Ginza Pte Ltd v Vista Corporation Pty Ltd*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000 (WASC Jan. 17, 2003), translation available at [cisgw3.law.pace.edu/cases/030117a2.html](http://cisgw3.law.pace.edu/cases/030117a2.html), 197-200 ("This outcome reflects the proportion the value the goods actually delivered had at time of the delivery (effectively no value) to the value that conforming goods would have had at that time"); *Frozen pork case 1*, No. 7 U 40/02, (OLG Frankfurt Jan. 29, 2004) (Germany), translation available at [cisgw3.law.pace.edu/cases/040129g1.html](http://cisgw3.law.pace.edu/cases/040129g1.html) (price reduction until zero because the goods are worthless (frozen pork meet that is suspected to be contaminated with dioxins)); *In re Siskiyou Evergreen, Inc.*, No. 02-66975-fra11 (Bankr. D. Ore. March 29, 2004) (US), available at [cisgw3.law.pace.edu/cases/040329u2.html](http://cisgw3.law.pace.edu/cases/040329u2.html), 2004 Bankr. LEXIS 1044 (the buyer can get the price back of each non-conforming lot); *Frozen pork case 2*, No. VIII ZR 67/04 (the price of meet that was possibly contaminated with dioxins can be reduced until zero because there was no possibility to use the meet); *Coffee machines case*, No 3 Ob 193/04k (very detailed); *Potatoes case 1*, No. 16 U 57/05 (some lots of non-conforming potatoes cannot be sold anymore); *Bottles case*, No. 2 U 923/06; *GSM modules case*, No. A3 2006 79 (no application of the price reduction remedy; but the judge considers that a price reduction until zero would be possible if the goods would have been completely worthless).

<sup>150</sup> For an overview of the different points of view but do not defend one particular view see Huber & Mullis, *supra* note 5, at 254.

<sup>151</sup> Bach, *supra* note 4, at n° 48-50. See also Magnus, *Art. 50 CISG*, *supra* note 5, at n° 23 (implicitly). The buyer is obliged to return the useless good to the seller in case of price reduction until zero under German law (§ 346(1) BGB): C. Berger, § 441 *Minderung*, in *BÜRGERLICHES GESETZBUCH* z.p., n° 6 (O. Jauernig ed., 2011); A. Matusche-Beckmann, § 441, in *VON STAUDINGERS KOMMENTAR ZUM BGB* 308, n° 25 (M. Martinek ed., 2004).

<sup>152</sup> Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 15 and 45-46 (1997) (these authors change their opinion in the edition of 2010).

<sup>153</sup> Müller-Chen, *supra* note 4, at 777, n° 13.

## § 5. Interest and price reduction

Must the seller, who has already received full payment, pay interests for the part he should reimburse, if a price reduction is applied afterwards? Most authors believe the seller must pay interest. However, there is a doctrinal dispute whether Article 78 CISG or Article 84(1) CISG has to be applied.<sup>154</sup> Some legal scholars prefer applying Article 78 CISG.<sup>155</sup> This Article states that if a party fails to pay a price, the other party is entitled to interests on it. Other legal scholars prefer applying Article 84(1) CISG.<sup>156</sup> This Article states that if the seller must reimburse the price, he must also pay interests on it, from the date on which the price is paid. This would mean – according to this point of view – that the interest in case of termination and in case of price reduction would be calculated in the same way. Apart from this, some authors argue that a delay in payment is a breach of contract and should be indemnified by damages under Article 45(1)(b) CISG.<sup>157</sup>

There is also discussion about *when* the interest starts accruing. Some authors suggest that the seller must pay interests *from the moment he received the unjustified payment* (the payment of the price).<sup>158</sup> Bach, who defends this point of view, argues that *only* Article 84(1) CISG provides that the interest will accrue as from the payment of the price. The application of article 78 CISG presupposes interests as from the moment the seller is in 'delay', which only commences at the moment of the buyer's price reduction declaration.<sup>159</sup> This would be – according to Bach – another argument to prefer applying Article 84(1) CISG with regard to the interest. Other legal scholars defend rightly that interests only should accrue as from the moment the seller is in delay, *i.e.* from the moment of the buyer's price reduction declaration of the buyer<sup>160</sup> or the (judicial) demand for price reduction. As a result, Article 78 CISG seems more appropriate to explain the interest which the seller has to pay because the price reduction is applied after he had already received full payment.

## § 6. Place of reimbursement of price reduction

If the buyer has already paid the full price and decides to apply later on for a price reduction, we must establish *where* the seller has to reimburse part of the price. At first sight, the CISG does not give an answer to this question. Doctrine believes that Article 57(1)(a) CISG, which states that the place where the price has to be paid corresponds to the place of business of the seller, contains a general principle of the CISG: payment has to be done at the place of business of the *creditor*.<sup>161</sup> This means that the seller has to reimburse part of the price at the place of business of the buyer.<sup>162</sup>

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<sup>154</sup> For the discussion see Huber & Mullis, *supra* note 5, at 251 (the authors do not defend a particular view).

<sup>155</sup> Müller-Chen, *supra* note 4, at 778-779, n° 16. *Accord* Heuzé, *supra* note 28, at n° 462; Schnyder & Straub, *Art. 50, supra* note 21, at n° 52 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 52 (2010); Williams, *supra* note 73, at IV.C.5. *Accord Frozen plums and raspberries case*, No. T-13/05 (but the interest only runs as from the moment the buyer brings the action against the seller, because the buyer has granted the seller an extra period of time for reimbursement).

<sup>156</sup> Bach, *supra* note 4, at 764. Apply also Article 84(1) CISG: Magnus, *Art. 50 CISG, supra* note 5, at n° 26; Schlechtriem & Butler, *UN LAW ON INTERNATIONAL SALES, supra* note 42, at 154.

<sup>157</sup> Bach, *supra* note 4, at 764; Müller-Chen, *supra* note 4, at 779, n° 16.

<sup>158</sup> Müller-Chen, *supra* note 4, at 778-779, n° 16. *Accord* Heuzé, *supra* note 28, at n° 463.

<sup>159</sup> Bach, *supra* note 4, at 764.

<sup>160</sup> Specify moreover that the price reduction declaration must specify the amount of price reduction before the interest starts to run: Schnyder & Straub, *Art. 50, supra* note 21, at n° 52 (1997); Schnyder & Straub, *Art. 50, supra* note 4, at n° 52 (2010).

<sup>161</sup> Bach, *supra* note 4, at 763; Huber & Mullis, *supra* note 5, at 314; Magnus, *Art. 50 CISG, supra* note 5, at n° 25.

<sup>162</sup> Bach, *supra* note 4, at 763; Magnus, *Art. 50 CISG, supra* note 5, at n° 25; Schnyder & Straub, *Art. 50, supra* note 4, at n° 52a (2010).

## § 7. Currency of reimbursement

In general, the reimbursement has to be done using the same currency as the original payment of the buyer, even if this currency was not what the parties had agreed on.<sup>163</sup>

## § 8. Comparison between damages and price reduction with regard to the calculation of the reduction in value

Legal doctrine considers rightly that the reduction in value is calculated differently in case of price reduction compared to damages. The calculation of price reduction would be *proportional* or *relative*, while the calculation of damages would be *absolute* or *linear*.<sup>164</sup> Damages depend on the abstract or absolute difference between the value of conforming and non-conforming goods.<sup>165</sup>

Piliounis<sup>166</sup> and Honnold<sup>167</sup> give an example.<sup>168</sup> In this example we suppose that the value of the goods is equal to the price of the goods. The seller contracts for 100 000 worth of cheese (the price equals 100 000), and receives at the time of delivery moldy cheese worth 1/5 of the value (= 20 000). If the price of cheese remains the same, there would be no difference between the amount claimed as damages or price reduction, namely 80 000 (except for the fact that if there are other losses than the reduction in value, this can also be compensated by means of damages).<sup>169</sup> If the price increases (of cheese *and* moldy cheese), we have seen in the preceding paragraph that the price reduction would remain 80 000. But the amount of damages would be more because there is a larger difference between what is contracted for and what has been delivered. E.g. if the price of cheese has doubled, the value of the conforming cheese would be 200 000 and the delivered value is 40 000. Here, the amount of damages would be 160 000. The other way around, if the price of cheese halves, the value of the delivered cheese would be 10 000 compared to the conforming goods worth 50 000, which are damages of only 40 000.

We can deduce from this example, that a price reduction can be more profitable than damages in falling market conditions (if the value of the conforming and non-conforming fall similarly).<sup>170</sup> Furthermore, a price reduction will be possible and damages will be excluded if

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<sup>163</sup> Bach, *supra* note 4, at 763.

<sup>164</sup> Bach, *supra* note 4, at 758; Piliounis, *supra* note 4, at 34; Schlechtriem & Butler, UN LAW ON INTERNATIONAL SALES, *supra* note 42, at 152-153. For the *relative* calculation method under Art. 50 CISG see also *Marble slabs case*, No. 6 R 194/95 ("*relative method of calculation*").

<sup>165</sup> Bach, *supra* note 4, at 758; Huber & Mullis, *supra* note 5, at 254; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 3.1; Müller-Chen, *supra* note 4, at 774, n° 8.

<sup>166</sup> Piliounis, *supra* note 4, at 34-36.

<sup>167</sup> Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 312; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at n° 312.

<sup>168</sup> For other examples see Bach, *supra* note 4, at 759; Bergsten & Miller, *supra* note 4, at 260-263; Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 589 (2007); Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 604-605 (2013).

<sup>169</sup> For a similar reasoning see Bach, *supra* note 4, at 759.

<sup>170</sup> See also Benicke, *supra* note 20, at n° 15; Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 589-590 (2007); Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 605 (2013); Gärtner, *supra* note 5, at II.A.2.b.(2); Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at § 312; Huber & Mullis, *supra* note 5, at 254-255; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, *Case annotated*, *supra* note 4, at n° 3.2; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 103; Müller-Chen, *supra* note 4, at 779-780, n° 18; Neumayer & Ming, *supra* note 40, at 356; Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 5 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 5 (2010); Shin, *supra* note 87, at n° I; Williams, *supra* note 73, at IV.C.5; Ziontz, *supra* note 134, at 172.

the buyer resells the goods with profit.<sup>171</sup> In this case, the buyer has not suffered any 'losses' and cannot claim damages. However, a price reduction can still be applied if the buyer shows that the value of goods has been reduced because of the non-conformity.

## § 9. Goal of the proportional calculation method

The price reduction has to be proportional with the reduction in value of the goods. The goal of the calculation method is that the buyer can *keep the bargain* and thus allow the parties to preserve a good or a bad bargain.<sup>172</sup>

For example, if you bought a designer lamp at the favorable price of 200 (and this lamp is actually worth 400) and due to a non-conforming delivery the lamp is only worth 300. In this case damages will correspond to 100 and a price reduction will be 50.<sup>173</sup> In the opposite situation, you can buy a design lamp at the price of 400 (and this lamp is actually worth 200). Due to a non-conforming delivery the lamp is only worth 100. This means that damages will correspond to 100 and a price reduction will be 200.

However, the Dutch author Van Der Velden correctly points out that two conditions have to be fulfilled to maintain the '*the balance of the bargain*': it must be possible to determine the proportion between the value of the conforming and the non-conforming goods, *and* this proportion must remain the same until the moment of delivery.<sup>174</sup> If the value of the conforming and non-conforming varies to a greater or lesser degree between the conclusion of the contract and the delivery (see e.g. *supra*, §2), the proportion between the value of conforming and non-conforming goods will change. This means that the calculation of price reduction, which takes place at the *moment of delivery*, will take this into account and increasingly obtains characteristics of the calculation of damages.<sup>175</sup>

## V. OTHER CHARACTERISTICS OF PRICE REDUCTION

### § 1. Price reduction as a claim and as a defense of the buyer

Surprisingly, Shondahl tries to classify this price reduction under one category: either as a '*claim*', or as a '*defense*', and suggests that it cannot be both.<sup>176</sup> Nevertheless, the price reduction remedy under Article 50 CISG can in principle be invoked as a claim *as well as* a defense by the *buyer*.<sup>177</sup> If the buyer has already paid the price of a defect good and he claims part of the price back, the buyer will use the price reduction as a claim. The buyer certainly

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<sup>171</sup> For the same opinion see Schnyder & Straub, *Art. 50, supra* note 4, at n° 5 (2010). For a case in which price reduction and damages are confused see Russia Arbitration proceeding, No. 318/1997 (TICARFCCI July 8, 1999), *translation available at* <http://cisgw3.law.pace.edu/cases/990708r1.html> (the arbitrators do not allow a price reduction because the buyer has sold the non-conforming goods at a higher price than the conforming goods; consequently, the buyer has not suffered any damages).

<sup>172</sup> Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated, supra* note 4, at n° 3.1 and 5.1. See also Huber & Mullis, *supra* note 5, at 252; Kritzer, *supra* note 21, at 377; Sondahl, *supra* note 5, at n° A.2 ("*the same relative bargain or the proportion of the bargain*"); Van Der Velden, *supra* note 5, at 351.

<sup>173</sup> Calculation: reduced price = (value non-conforming good (300) X agreed price (200))/(value conforming good (400)) = 150 (price reduction = 50).

<sup>174</sup> Van Der Velden, *supra* note 5, at 351.

<sup>175</sup> Van Der Velden, *supra* note 5, at 351.

<sup>176</sup> Sondahl, *supra* note 5, at n° A.3.i.

<sup>177</sup> Bach, *supra* note 4, at 758; Müller-Chen, *supra* note 4, at 778, n° 16.

also 'claims' a price reduction in case that the buyer unilaterally invokes the price reduction as a constitutive remedy. If the buyer has not yet paid the (entire) price, and the seller claims the payment of the full price, the buyer can use price reduction as a defense.<sup>178</sup> Furthermore, many CISG commentators put forward that Article 50 CISG is mostly used by the buyer as a 'defense', and not as an initial claim.<sup>179</sup>

I tried to answer the question of whether a price reduction is usually invoked by the buyer as a *claim* or as a *defense*, by means of a case law investigation, taking into account the relevant cases about article 50 CISG.<sup>180</sup> The result was conclusive. It is true that in a judicial procedure, a price reduction is, most of the time, used as a defense against the seller's claim for payment of the entire purchase price. Of 46 cases in which the buyer has explicitly used 'price reduction' as a defense or a claim, the buyer uses in 41 cases the price reduction as a defense. Of these 41 cases, the buyer was successful in 21 cases (and was allowed to apply a price reduction) and lost in 20 cases.<sup>181</sup> The five cases, in which the buyer used a price reduction as a claim, were decided in favor of the buyer.<sup>182</sup> We can conclude that a price

<sup>178</sup> *Bottles case*, No. 2 U 923/06 ("The right may also be used as an objection to the seller's claim for payment of the purchase price"). A price reduction is most of the time used as a defence of the buyer: Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, 2nd edition, Case annotated, *supra* note 4, at n° 2; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 107; Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.1.

<sup>179</sup> Piliounis, *supra* note 4, at 32.

<sup>180</sup> We took the published cases about article 50 CISG of the following databases into account (and which could be translated into English, French, German or Dutch): <http://www.cisg.law.pace.edu/cisg/text/digest-cases-toc.html> and <http://www.uncitral.org/clout/showSearchDocument.do>.

<sup>181</sup> For the 21 cases in which the buyer was successful in invoking a price reduction as a defense in case the seller claims (the remaining part of) the purchase price see: *Shoes case 1*, No. 41 O 198/89 (LG Aachen April, 3 1989) (Germany), translation available at <http://cisgw3.law.pace.edu/cases/900403g1.html>; *Interag Ltd v. Stafford Phase*, No. 89 Civ. 4950 (CSH), 1990 Westlaw 71478 (S.D.N.Y. May 22, 1990) (US), also available at [cisgw3.law.pace.edu/cases/900522u1.html](http://cisgw3.law.pace.edu/cases/900522u1.html); *Waste container case*, No. Vb 94131; *Diaper machine case*, No. CISG/1996/36; *Canned food case 1*, No. 95/11193; *I.S. Trading v. Vadotex*, No. 1995/AR/1558; *Christmas trees case*, No. BS 9700016-4; *Excavator case*, No. CISG/1999/26 (CIETAC May, 21 1999) (China), translation available at [cisgw3.law.pace.edu/cases/990521c1.html](http://cisgw3.law.pace.edu/cases/990521c1.html); *Tomatoes case*, 2002-03 RW 1351; *Porphyry stones case*, No. 15 O 179/01; *Ginza Pte Ltd v Vista Corporation Pty Ltd*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000; *Racing carts case*, No. 3 O 196/01; *Frozen pork case 1*, No. 7 U 40/02; Russia Arbitration proceeding, No. 126/2004; *Coffee machines case*, No 3 Ob 193/04k; *Plants case*, No. 2 O 51/02; *Poppy seed case*, No. 43 Cg 34/05f; *B.V. v. Produce Agencies Limited, Nieuw Zeeland*, No. 1259/05 (Hof Amsterdam Nov. 10, 2007) (Netherlands), available at <http://www.rechtspraak.nl>; *Potatoes case 2*, n° 5 Cb/114/2006; *Artificial turf case*, No. 25 O 99/09 (LG Stuttgart Oct. 29, 2009) (Germany), translation available at <http://cisgw3.law.pace.edu/cases/091029g1.html>; *Indice SL v. Defendant*, No. 284566 / HA ZA 07-1344 (Rb. Rotterdam June 1, 2011) (Netherlands), available at [www.rechtspraak.nl](http://www.rechtspraak.nl).

For the 20 cases in which the buyer was *not* successful in invoking a price reduction as a defense in case the seller claims (the remaining part of) the purchase price see: *Tinned cucumbers case*, No. 17 U 82/92; *Used agricultural machine (mower) case*, No. 2 C 425/92; *Coke case*, No. 7 U 4419/93; *Marble slabs case*, No. 6 R 194/95; *Waste container case*, No. Vb 94131; *Shoes case 3*, No. 36 O 178/95; *Acrylic blankets case*, No. 2 U 31/96; *Cashmere sweaters case*, No. 7 U 4427/97; *Art books case*, No. HG 970238.1; *Granular plastic case*, No. OR.98.00010; Russia Arbitration proceeding, No. 318/1997; *Video recorders case*, No. 10 O 72/00 (LG Darmstadt May 9, 2000) (Germany), translation available at [cisgw3.law.pace.edu/cases/000509g1.html](http://cisgw3.law.pace.edu/cases/000509g1.html); *Granite rock case*, No. 22 S 234/94; *Live sheep case*, No. 11 U 40/01; *Window frames case*, No. C/12709/2001; *Used textile washing machine case*, No. 11 01 73, 2004 Revue de la Société des juristes bernois (RJB) 704 (OG [Obergericht] Luzern May 12, 2003) (Switzerland), see also CLOUT abstract n° 87; *Scrap metal case*, No. 648/2000 (Audiencia Provincial de Vizcaya, sección 5ª Nov. 5, 2003) (Spain), translation available at [cisgw3.law.pace.edu/cases/031105s4.html](http://cisgw3.law.pace.edu/cases/031105s4.html); Russia Arbitration proceeding, No. 126/2004; *Hungarian wheat case*, No. 7 U 10/04; *Production line case*, No. 06/16296 (CA Aix-en-Provence May 7, 2009) (France), available at [cisg.fr/decision.html?lang=fr&date=09-05-07](http://cisg.fr/decision.html?lang=fr&date=09-05-07).

<sup>182</sup> *Platform case*, No. CISG/2002/26 (CIETAC Nov. 11, 2002) (China), translation available at [cisgw3.law.pace.edu/cases/021111c1.html](http://cisgw3.law.pace.edu/cases/021111c1.html); *Ferrochrome case*, No. CISG/2003/07 (CIETAC Jan. 19, 2003) (China), translation available at [cisgw3.law.pace.edu/cases/030119c1.html](http://cisgw3.law.pace.edu/cases/030119c1.html); Russia Arbitration proceedings, No. 97/2004; *Water heater production line case*, No. CISG/2006/20 (CIETAC April 2006) (China), translation available at [cisgw3.law.pace.edu/cases/060400c1.html](http://cisgw3.law.pace.edu/cases/060400c1.html); *Machinery case*, (Chamber of National and International Arbitration Milan July, 30, 2007) (Italy), abstract available at [cisgw3.law.pace.edu/cases/070730i3.html](http://cisgw3.law.pace.edu/cases/070730i3.html).

reduction is usually invoked as a defense, and that it can be used by the buyer as a claim *and* as a defense.

## § 2. Price reduction before and after the payment of the price

Article 50 CISG allows the buyer to apply a price reduction both *before* and *after* the payment of the price.<sup>183</sup> Indeed, Article 50 CISG clearly states that the buyer may reduce the price "*whether or not the price has already been paid*". Will considers the price reduction remedy as an exceptionally powerful weapon if the buyer has not yet paid the price.<sup>184</sup> This is true because the buyer can – under these circumstances – easily invoke an extrajudicial price reduction (see also *supra* III.§1.b and III.§2.a).

## § 3. No restitution

I have already indicated, with regard to the price reduction until zero, that the buyer does not have to return the non-conforming goods (see *supra*, IV.§4). The application of the price reduction typically implies that the buyer keeps the non-conforming good.<sup>185</sup> This is also the case for the price reduction under Article 50 CISG. The buyer accepts, in principle the non-conforming goods (with a reservation about the price) and keeps them in order to apply a price reduction.<sup>186</sup>

## § 4. Resale

A resale does not exclude the application of Article 50 CISG.<sup>187</sup> This means that buyer can apply the price reduction remedy even if he sells the goods (immediately) afterwards. However, Liu does not exclude that a resale might have an influence on the amount of the price reduction.<sup>188</sup> Indeed, a resale will often give an indication of the value of the non-conforming goods (see also for the burden of proof of the buyer *infra*, §6).<sup>189</sup> Nevertheless, in contrast to damages, a price reduction will not be excluded if the buyer resells the non-

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<sup>183</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 42 ("Article 46 [at present Article 50] *does not depend on the buyer's ability to withhold future sums due*"). For cases where the judge expressly invokes this principle see e.g. *Art books case*, No. HG 970238.1 (the buyer has already paid part of the price); *Frozen pork case 2*, No. VIII ZR 67/04 (the price reduction can be applied after the payment of (a part of) the price); *Plants case*, No. 2 O 51/02 (the price had in this case not yet been paid); *Potatoes case 2*, n° 5 Cb/114/2006 (part of the price has already been paid and the seller claims the remaining part of the price while the buyer wants to apply a price reduction).

<sup>184</sup> Will, *supra* note 4, at 373, n° 2.2.

<sup>185</sup> Müller-Chen, *supra* note 4, at n° 1.

<sup>186</sup> Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 104

<sup>187</sup> *Canned food case 1*, No. 95/11193; *Canned food case 2*, No. S 97/324 (price reduction can be applied irrespective of the fact that the non-conforming goods have been resold); *Excavator case*, No. CISG/1999/26 (the arbitrators apply a price reduction after the machines had been resold); *B.V v. Produce Agencies Limited, Nieuw Zeeland*, No. 1259/05. Accord Bach, *supra* note 4, at 750; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 2; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 105.

<sup>188</sup> *Canned food case 1*, No. 95/11193. Accord Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 2; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 105.

<sup>189</sup> Cf. *Interag Ltd v. Stafford Phase*, No. 89 Civ. 4950 (CSH) ("*it is well settled that the price obtained for defective goods on resale is probative of the value of the goods as actually received*" (citation of the US case law)).

conforming goods *with profit* (see also *supra*, IV.§8).<sup>190</sup> The buyer can still apply a price reduction if he establishes that the goods have been reduced in value due to the non-conformity.<sup>191</sup>

## § 5. Combination of price reduction and damages

The remedies of damages and price reduction can be combined.<sup>192</sup> Article 45 (1)(a)(b) and (2) CISG state that the buyer is not deprived of any right he may have to claim *damages* by exercising his rights to other remedies (in the Articles 46-52 CISG). Of course, the two remedies cannot be applied at the same time for the same 'loss'.<sup>193</sup> In case of a combination of both remedies, a price reduction will remedy the reduction in value of the goods due to the non-conform delivery, while the damages will compensate any additional losses. The damages can only compensate other items of loss and cannot compensate for the reduced value due to the non-conformity of the goods, which has already been made good by the price reduction.

## § 6. Burden of Proof

In order to obtain a price reduction the buyer has to prove the original price, the value of a conforming good, and the value of a non-conforming good.<sup>194</sup> This means implicitly that the

<sup>190</sup> *Accord* Schnyder & Straub, Art. 50, *supra* note 4, at n° 5 (2010). *Contra* Russia Arbitration proceeding, No. 318/1997 (the arbitrators do not allow a price reduction because the non-conforming goods were sold at a higher price than the conforming goods; the buyer has, consequently, not suffered any 'damage').

<sup>191</sup> If the resale of the goods excludes that the buyer can prove that there is a non-conformity or if he thereby breaches the conditions of the Articles 38 (duty to examine) and 39 (duty to notify) CISG, a price reduction cannot be applied. *See also Furniture case*, No. 6252.

<sup>192</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, 43. *Accord Meat case*, No. 4C.179/1998/odi (BGer [Bundesgericht] October 28, 1998) (Switzerland), translation available at [cisgw3.law.pace.edu/cases/981028s1.html](http://cisgw3.law.pace.edu/cases/981028s1.html); *Porphy stones case*, No. 15 O 179/01; *Window frames case*, No. C/12709/2001 ("A claim for damages and interest exists parallel with a claim for replacement or repair of goods, and a claim for price reduction"); *Ginza Pte Ltd v Vista Corporation Pty Ltd*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000 (next to the price reduction the buyer can ask for "damages for negligence"); *In re Siskiyou Evergreen, Inc.*, No. 02-66975-fra11; *Watches case*, No. 11 04 4 / ZU 016 (AG [Amtsgericht] Luzern-Land Sept. 21, 2004) (Switzerland), translation available at [cisgw3.law.pace.edu/cases/040921s1.html](http://cisgw3.law.pace.edu/cases/040921s1.html) (but ultimately both remedies were not allowed); Russia Arbitration proceedings, No. 97/2004; *Potatoes case I*, No. 16 U 57/05; *Artificial turf case*, No. 25 O 99/09. *Accord* Bach, *supra* note 4, at 765-766; Benicke, *supra* note 20, at n° 15; Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 603-604 (2013); Gonzalez, *supra* note 5, 92; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 448, n° 312; Huber & Mullis, *supra* note 5, at 255; Kritzer, *supra* note 21, at 377; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 3.3; Magnus, Art. 50 CISG, *supra* note 5, at n° 30; Müller-Chen, *supra* note 4, at 779, n° 18; Piliounis, *supra* note 4, at 33; Schnyder & Straub, Art. 50, *supra* note 21, at n° 57 (1997); Schnyder & Straub, Art. 50, *supra* note 4, at n° 57 (2010); Schwenzer, et al., INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, *supra* note 22, at 407; Van Der Velden, *supra* note 5, at 350-351; Will, *supra* note 4, at 372-373, n° 2.2.

<sup>193</sup> *Meat case*, No. 4C.179/1998/odi; *Live sheep case*, No. 11 U 40/01 (a price reduction for the reduction in value (because the sheep were too lean), makes goods for the same item of loss as damages for fattening the same sheep). *Accord* Bach, *supra* note 4, at 765; Benicke, *supra* note 20, at n° 15; Honnold & Flechtner, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, *supra* note 10, at 448, n° 312; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 5, at n° 3.3; Liu, REMEDIES IN INTERNATIONAL SALES, *supra* note 31, at 115-117 and 119; Müller-Chen, *supra* note 4, at 780, n° 18; Schnyder & Straub, Art. 50, *supra* note 21, at n° 57 (1997); Schnyder & Straub, Art. 50, *supra* note 4, at n° 57 (2010); Schwenzer, et al., INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, *supra* note 22, at 407.

<sup>194</sup> *See Used textile washing machine case*, No. 11 01 73 (no price reduction because the buyer does not prove that the defect causes a reduction in value); *Dashboard mould case*, No 2010/AR/3455 (the buyer has to prove that the amount of the demanded price reduction corresponds to the proportional price reduction formula). *But see Down jacket and winter coat case*, No. CISG/1995/05 (CIETAC March 22, 1995) (China), translation available at



buyer has to prove the non-conformity of the good (see for the condition of application of non-conformity *supra*, II.§2).<sup>195</sup> Even for goods for which a market price exists<sup>196</sup> – both for conforming and non-conforming goods – an expert is sometimes called upon to determine this 'market price'.<sup>197</sup> If it concerns goods for which *no* market price exists, it is assumed that the agreed price corresponds with the value of the conforming goods at the moment of delivery.<sup>198</sup> It is also sometimes argued that in this last case, the reduction of value corresponds with the cost for the buyer to repair the good.<sup>199</sup> The UNCITRAL 'Secretariat Commentary' of the CISG states that if the goods have no market price and if the reduction in value is difficult to establish, the judge or the arbiter finally has to decide.<sup>200</sup>

## § 7. Derogating contracts

According to Article 6 CISG the parties can conclude derogating contracts and change the rules of Article 50 CISG or exclude them.<sup>201</sup> Consequently, parties can agree upon the precise role of the judge and the parties, a different price reduction mechanism and prescribe the exact calculation method.<sup>202</sup>

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cisgw3.law.pace.edu/cases/950322c1.html (e.g. "With respect to the winter coats, [Buyer] failed to prove that the defect in color resulted in any loss to it", it is unclear whether 'loss' refers to 'damages' or to a reduction in value); Russia Arbitration proceeding, No. 318/1997 (this judgement does not allow a price reduction because the non-conforming goods were resold at a higher price as the conforming goods; as a consequence, the buyer would not have suffered any losses). For an alleviation of the buyer's burden of proof because the parties agreed that the price reduction would be calculated proportionately, taking into account the best possible price that the buyer could get when reselling the non-conforming goods see *Potatoes case 1*, No. 16 U 57/05. See also Bach, *supra* note 4, at 764-765; Benicke, *supra* note 20, at n° 10 (without any reference to the original price); Bridge, THE INTERNATIONAL SALE OF GOODS, *supra* note 5, at 604 (2013) (only refers to the fact that the buyer must prove that the goods have reduced in value); Heuzé, *supra* note 28, at n° 458; Magnus, *Art. 50 CISG*, *supra* note 5, at n° 34 (without any reference to the original price); Müller-Chen, *supra* note 4, at 778, n° 15 (without any reference to the original price); Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 58 (1997) (without any reference to the original price); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 58 (2010) (without any reference to the original price). The following authors seem to confirm this: Huber & Mullis, *supra* note 5, at 251.

<sup>195</sup> *Flowers case*, No. 28 O 20906/06. See also *Video recorders case*, No. 10 O 72/00 (a price reduction is rejected because the buyer does not prove the defect of the goods); *Scrap metal case*, No. 648/2000 (a price reduction is rejected because the buyer cannot prove that the goods did not conform the contract); *Cuttlefish case*, No. 403/2008 (Audiencia Provincial de Barcelona, sección 13ª March 24, 2009) (Spain), translation available at cisgw3.law.pace.edu/cases/090324s4.html (no prove of a non-conformity; as a consequence Art. 50 CISG cannot be applied); *Jar lid case*, No. 2007/AR/2569 (CA Ghent Oct. 7, 2009) (Belgium), available at www.cass.be. See also Kruisinga, *supra* note 22, at 171 (see also very detailed about different opinions pp. 168-177). But see: *Plants case*, No. 2 O 51/02 (if the buyer notifies the seller within a reasonable time of the defect, the burden of proof lies with the seller and the latter has to prove that the goods are in conformity with the contract at the moment of the transfer of risk). See also Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 58 (2010).

<sup>196</sup> Cf. *Interag Ltd v. Stafford Phase*, No. 89 Civ. 4950 (CSH) ("it is well settled that the price obtained for defective goods on resale is probative of the value of the goods as actually received" (citation of US case law)).

<sup>197</sup> *B.V v. Produce Agencies Limited, Nieuw Zeeland*, No. 1259/05.

<sup>198</sup> Bach, *supra* note 4, at 765; Müller-Chen, *supra* note 4, at 778, n° 15. Without reference to the fact that no market price exists: Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 58 (2010). See also *Furniture case*, No. 6252 ("The objective value of the conforming goods is presumed to correspond to the agreed upon price").

<sup>199</sup> Bach, *supra* note 4, at 765. See also *Furniture case*, No. 6252 ("The difference between the value of the conforming goods and the value of the non-conforming goods does not necessarily coincide with the cost to repair, but most of the time it does").

<sup>200</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 43.

<sup>201</sup> Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 60-61 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 60-61 (2010).

<sup>202</sup> For an alleviation of the buyer's burden of proof because the parties agreed that the price reduction would be calculated proportionately, taking into account the best possible price that the buyer could get when reselling the non-conforming goods see *Potatoes case 1*, No. 16 U 57/05.

## VI. COMPARISON WITH OTHER REMEDIES UNDER THE CISG

Confusion exists between price reduction and other remedies under the CISG. Admittedly, sometimes price reduction and other remedies seem to have the same outcome. Commentators of Article 50 CISG have already pointed to overlaps between price reduction and other remedies. Indeed, Article 51(1) CISG provides that if there is only a partial delivery or only part of the goods have been delivered in conformity with the contract, the buyer's remedies may be applied contained in Articles 46 to 50 CISG. These remedies may be partial avoidance (termination), price reduction and damages as compensation for the reduction in value. All those remedies might practically lead to the same result.

### § 1. Price reduction and partial termination

The remedies of price reduction and partial termination can lead to the same result.<sup>203</sup> As I have indicated, Article 51 CISG provides a possibility to *partially terminate* the contract if the seller only delivers part of the goods or if only part of the goods conform the contract (Art. 51(1) CISG).<sup>204</sup> Article 51(2) CISG states that if a partial delivery or a non-conforming delivery amounts to a fundamental breach, the buyer can terminate the whole contract.<sup>205</sup> The application of Article 51 CISG supposes that the sold goods can be separated or are *divisible*.<sup>206</sup> It really concerns separate, physical and economical autonomous goods, which are only partially delivered.<sup>207</sup> The application Article 51(1) CISG means that the buyer may not refuse partial delivery, except if this partial delivery amounts to a fundamental breach of the sales contract (Art. 51(2) CISG).<sup>208</sup> When applying Article 51 CISG, the seller's right to

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<sup>203</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 42.

<sup>204</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 44 ("*In effect, this paragraph provides that the buyer can avoid a part of the contract*"). For a reference to 'partial termination' see also Bach, *Art. 51, supra* note 4, at n° 35 *et seq.*; Müller-Chen, *Art. 51 CISG, supra* note 4, at 781, n° 1; Schwenger, et al., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, supra* note 22, at 412.

<sup>205</sup> See Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, supra* note 10, at n° 317; Müller-Chen, *Art. 51 CISG, supra* note 4, at 785, n° 9-10.

<sup>206</sup> Bach, *Art. 51, supra* note 4, at 771-773; Benicke, *Art. 51 CISG, supra* note 20, at n° 2-3; Magnus, *Art. 51 CISG, supra* note 5, at n° 4; Müller-Chen, *Art. 51 CISG, supra* note 4, at 782, n° 2; Schnyder & Straub, *Art. 51, supra* note 21, at n° 8 *et seq.* (1997) (very detailed); Schnyder & Straub, *Art. 51, supra* note 4, at n° 8 *et seq.* (2010).

<sup>207</sup> Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION, supra* note 10, at n° 316; Magnus, *Art. 51 CISG, supra* note 5, at n° 4; Müller-Chen, *Art. 51 CISG, supra* note 4, at 782, n° 2; Schwenger, et al., *INTERNATIONAL SALES LAW. A GUIDE TO THE CISG, supra* note 22, at 412; Lisa Spagnolo, *The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELB. J. INT'L L. 141, 186 (2009) (this author discusses critically a decision of the Supreme Court of Western Australia (*Ginza Pte Ltd v Vista Corporation Pty Ltd*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000), because the Court rejected the application of Article 51(1) CISG without ruling about the divisibility of the goods). Suggests another criterion: Bach, *Art. 51, supra* note 4, at 771-773 (the price of the part has to be identifiable and it must be possible to separate the part or to add the separated part again).

<sup>208</sup> Bach, *Art. 51, supra* note 4, at 781; Müller-Chen, *Art. 51 CISG, supra* note 4, at 783, n° 4; Spagnolo, *supra* note 207, at 186 (this author critically discusses a judgement of the Supreme Court of Western Australia (*Ginza Pte Ltd v Vista Corporation Pty Ltd*, No. [2003] WASC 11, CIV 1647 of 1998 consolidated by order 12/5/2000) because the Court rejected the application of Article 51(1) CISG without verifying whether the shortcoming of the seller was fundamental under Article 51(2) CISG).

cure will have priority (except in case of application of Article 49(1) CISG).<sup>209</sup> For instalment contracts, Article 73 CISG is applicable.<sup>210</sup>

In the case of instalment contracts Article 73(1) CISG states that if the failure of one party to perform any of this obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract terminated with regard to that instalment. This Article seems only to allow a *termination* as a remedy with regard to one instalment. Nevertheless, some authors are of the opinion that also other remedies (such as a price reduction) can be applied with regard to one instalment.<sup>211</sup>

In case of a *partial delivery* (a shortcoming in the *quantity*) price reduction under Article 50 and partial termination under Article 51 CISG can turn out to the same pecuniary compensation.<sup>212</sup> However, a partial termination under Article 51 CISG will require a fundamental shortcoming (with regard to that part of the contract)<sup>213</sup> or will require that the buyer grants the seller an extra period of time to perform in accordance with Article 49 CISG.<sup>214</sup> Indeed, Article 49(1)(b) CISG requires that in case of a non-delivery (which is the case for the concerning part) the buyer fixes an additional period of time.

In case of a *non-conforming partial delivery* (due to a lack of quality of a part of the delivery) some clarifications must be made. Suppose that 100 units have been delivered in conformity and 20 units have a defect in quality which is a fundamental shortcoming *with respect to that part of the contract*.<sup>215,216</sup> In this case, Article 51 CISG will allow that the buyer terminates the contract with regard to the 20 units and to reduce the price with 1/5<sup>th</sup>.<sup>217</sup> The buyer may also keep the entire delivery and apply a price reduction for the reduction in value with regard to the 20 units under Article 50 CISG or under Article 51 CISG (but by means of the theory of price reduction and not by applying partial termination).<sup>218</sup> Suppose that a very small non-conformity would affect all the goods, which is *not fundamental* to the contract. In this case partial termination cannot be applied because all the goods are affected with non-conformity, and there is no fundamental shortcoming. A price reduction can offer relieve and enable the parties to maintain the contract if the conditions of application of Article 50 CISG are fulfilled.<sup>219</sup>

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<sup>209</sup> See Müller-Chen, *Art. 51 CISG*, *supra* note 4, at 784, n° 6.

<sup>210</sup> Bach, *Art. 51*, *supra* note 4, at 769-770 (but Art. 51 CISG can also be applied in case of a non-conformity of only one instalment); Müller-Chen, *Art. 51 CISG*, *supra* note 4, at 782-783, n° 3.

<sup>211</sup> Schlechtriem & Butler, *UN LAW ON INTERNATIONAL SALES*, *supra* note 42, at 147.

<sup>212</sup> Bergsten & Miller, *supra* note 4, at 259-260. See also Müller-Chen, *Art. 50 CISG*, *supra* note 4, at 784, n° 6. But see Bach, *Art. 51*, *supra* note 4, at 780 (seems not to accept this: a price reduction would not be applicable under these circumstances).

<sup>213</sup> This fundamental shortcoming may be considered taking into account the relevant part of the contract and not taking into account the whole contract: Bach, *Art. 51*, *supra* note 4, at 778. See also Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 44 ("However, under article 47 (1) [at present Article 51(1)] it is clear that under this Convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part").

<sup>214</sup> Bach, *Art. 51*, *supra* note 4, at 778; Müller-Chen, *Art. 51 CISG*, *supra* note 4, at 784, n° 6; Schnyder & Straub, *Art. 51*, *supra* note 21, at n° 41 (1997); Schnyder & Straub, *Art. 51*, *supra* note 4, at n° 40 (2010).

<sup>215</sup> This fundamental shortcoming may be considered taking into account the relevant part of the contract and not taking into account the whole contract: Bach, *Art. 51*, *supra* note 4, at 777.

<sup>216</sup> Only termination because of a 'fundamental' shortcoming can be applied with regard to this non-conforming part (and not a termination because the seller did not respect the extra period of time under Article 49(1)(b) CISG, because the application of this Article supposes a 'non-delivery'): Schnyder & Straub, *Art. 51*, *supra* note 21, at n° 41 (1997); Schnyder & Straub, *Art. 51*, *supra* note 4, at n° 47 (2010).

<sup>217</sup> Müller-Chen, *Art. 51 CISG*, *supra* note 4, at 784, n° 7.

<sup>218</sup> Bach, *Art. 51*, *supra* note 4, at 780. See also Müller-Chen, *Art. 51 CISG*, *supra* note 4, at 784, n° 7.

<sup>219</sup> For this example see Heuzé, *supra* note 28, at n° 459.

I also have to point at another important difference between (partial) termination and price reduction.<sup>220</sup> Termination of the contract requires that restitution has to be made of the non-conforming goods to the seller (Art. 81 CISG). The price reduction remedy precisely requires the buyer to keep the non-conforming goods (see *supra*, V.§3). The price reduction remedy under Article 50 CISG can still be applied if the buyer cannot give back the goods to the seller, even by his own fault.<sup>221</sup>

## § 2. Price reduction and damages

At first sight, the remedies of price reduction and damages appear to be very similar. Some authors are particularly critical about the remedy of price reduction, and think that this remedy does not really differ from a damages claim:

*'Whether there is anything to be gained from not simply regarding such a remedy as a damages claim, other than a continuation of the Civilian tradition, is an open question; perhaps its advantage would be the 'self-help' element in deducting sums from payments due, a remedy often explicitly provided for in commercial contracts'.*<sup>222</sup>

Nevertheless, price reduction and damages are two *different* remedies that can be invoked by the buyer.<sup>223</sup> I have already pointed to the different *calculation method* of both remedies (see *supra*, IV.§8) and to the fact that price reduction and damages can be *combined* in so far they do not compensate the same losses (see *supra*, V.§5). Also other elements can differentiate the price reduction remedy from damages. First of all, a price reduction can be invoked *extra-judicially*, which is in principle, impossible in case of damages.<sup>224</sup> Secondly, damages require that the party in breach *foresaw* or ought to have foreseen the loss (Art. 74 CISG), which is not required for the calculation of a price reduction.<sup>225</sup> Further, in order to get damages, the buyer has to *prove* its actual loss,<sup>226</sup> where it suffices to prove the original price and the value of a conforming and non-conforming goods for the application of price reduction (see *supra*, V.§6).<sup>227</sup> Price reduction can also play an important role if the *liberating circumstances* under Article 79(1) CISG occur.<sup>228</sup> Article 79(5) CISG does not allow

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<sup>220</sup> About this difference see Heuzé, *supra* note 28, at n° 459.

<sup>221</sup> Heuzé, *supra* note 28, at n° 459.

<sup>222</sup> H.L. Macqueen, *Remedies for Breach of Contract: The Future Development of Scots Law in its European and International Context*, EDINBURGH L. REV. 200, 225 (1996-97).

<sup>223</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 42.

<sup>224</sup> Most of the time damages will be negotiated or be estimated through legal proceedings: Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 3.1; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 103. See also Heuzé, *supra* note 28, at n° 460; Sondahl, *supra* note 5, at n° A.1.

<sup>225</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 42. Bach, *Art. 50*, *supra* note 4, at 750; Sondahl, *supra* note 5, at n° A.2.

<sup>226</sup> Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 3.2; Piliounis, *supra* note 4, at 33-34 (if the buyer buys something for charity purposes, a non-conforming delivery will not necessarily cause him damages because of the reduction in value of the goods. This means that it is difficult to obtain damages, but does not affect the possibility to apply a price reduction).

<sup>227</sup> See *I.S. Trading v. Vadotex*, No. 1995/AR/1558 (the judge rejects a claim for damages because the buyer could not prove his loss, but a price reduction is allowed under Art. 50 CISG). For an incorrect decision in which price reduction is not allowed because the non-conforming goods were resold at a higher price than the conforming goods (this meant – according to the arbitrators – that the buyer did not suffer any damages) see Russia Arbitration proceeding, No. 318/1997.

<sup>228</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat ("Secretariat Commentary") 1978, nr. UN DOC. A/CONF. 97/5, at 42. Bach, *Art. 50*, *supra* note 4, at 750 (does not merely

damages, but all the other remedies under the CISG, such as price reduction, can still be applied. Finally, the *goals* of damages and price reduction fundamentally differ. On the one hand, damages compensate the actual loss of the buyer. The allocation of damages will put the buyer in the position he would have been in when no breach of contract has occurred and the seller has honored the contract.<sup>229</sup> A price reduction will, on the other hand, preserve the bargain (see also *supra*, IV.§9). The buyer will be treated as if he had bought the non-conforming goods.<sup>230</sup> Some authors point to a different contextual approach.<sup>231</sup> The allocation of damages stems from an economic logic and efficiency. However, a price reduction would be based on a moral background and points to the right of the buyer to maintain the promise of the seller.

## VII.CONCLUSION

Price reduction under Article 50 CISG is a fascinating remedy. It has major advantages for the buyer in comparison with the other remedies of the CISG. Compared to damages, applying a price reduction has the advantages that, it can be invoked *extra-judicially*, while the *burden of proof* is limited to the establishment of a reduction in value of the good due to a non-conforming delivery. Further, price reduction can be invoked when the *liberating circumstances* under Article 79 CISG occur, which is not the case for damages.

Compared to termination, price reduction has the advantage that there are no restitution duties for the buyer and that he does not have to respect a time limit to invoke the price reduction remedy. This is not the case for termination. Indeed, Articles 81 and 82 CISG oblige the buyer to make *restitution*, while Article 49(2) CISG obliges the buyer to respect a *reasonable time* to invoke the declaration of *termination*<sup>232</sup>. Price reduction will not necessarily be ruled out if this 'reasonable period of time' to invoke termination has elapsed.<sup>233</sup>

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mention *force majeure*, but also mentions '*imprévision*'); Benicke, *Art. 50 CISG*, *supra* note 20, at n° 3; Bergsten & Miller, *supra* note 4, at 265 and 273; Gärtner, *supra* note 5, at II.A.2.b.(1); Gonzalez, *supra* note 5, at 92; Gustin, *supra* note 45, at 398; Heuzé, *supra* note 28, at n° 460 and 476; Honnold & Flechtner, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION*, *supra* note 10, at n° 311; Kritzer, *supra* note 21, at 376; Kruisinga, *supra* note 22, at 125; Liu, *Price Reduction for Non-Conformity: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, 2nd edition, Case annotated*, *supra* note 4, at n° 3.2; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 103 and 109-110; Magnus, *Art. 50 CISG*, *supra* note 5, at n° 4; Müller-Chen, *Art. 50 CISG*, *supra* note 4, at 779, n° 18; Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.3.4; Neumayer & Ming, *supra* note 40, at 356-357; Piliounis, *supra* note 4, at 34; Schlechtriem & Butler, *UN LAW ON INTERNATIONAL SALES*, *supra* note 42, at 153; Sondahl, *supra* note 5, at n° A.2; Schnyder & Straub, *Art. 50*, *supra* note 21, at n° 5 and 17 (1997); Schnyder & Straub, *Art. 50*, *supra* note 4, at n° 5 and 17 (2010); Shin, *supra* note 87, at n° I; Williams, *supra* note 73, at IV.C.5; Ziontz, *supra* note 134, at 172. For an example see also Honnold, *Article 50 Reduction of the Price*, *supra* note 4, at §§ 309-311.

<sup>229</sup> E.g. Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 108.

<sup>230</sup> E.g. Flechtner, *supra* note 21, at 174; Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 109.

<sup>231</sup> E.g. Muria Tunon, *supra* note **Error! Bookmark not defined.**, at n° 4.3.5. See also Liu, *REMEDIES IN INTERNATIONAL SALES*, *supra* note 31, at 109.

<sup>232</sup> See Art. 49(2) CISG: "However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach; (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance."

<sup>233</sup> For a case in which the difference between a price reduction (no time limit) and termination (time limit) is stressed see *Coffee machines case*, No 3 Ob 193/04k. For other cases in which a price reduction is not precluded when the time limit for

Nonetheless, the most important pitfall is that, like the other remedies, price reduction requires that the buyer *notifies the seller of the nature of the non-conformity* within a reasonable time. In many cases the buyer loses its right to reduce the price because he forgets to respect this obligation. Furthermore, if the buyer wants to invoke the price reduction extra-judicially, he must do this by means of a price reduction declaration, in which he must express his *intention* to apply the price reduction remedy unilaterally and give the *motivation* thereof.

The advantages of the price reduction remedy under the CISG result in a frequent application in case law. This case law, in mutual co-operation with legal doctrine, fleshed out many uncertainties about the price reduction remedy. I was, for example, able to discern a rather clear overview of the conditions of application of price reduction and the role of the parties and the judge. Moreover, the typical proportional calculation method described in detail by legal doctrine and applied in case law has divulged almost all its secrets. It is true that some elements remain unclear. For example, it is disputable whether parties can invoke a price reduction *before* the effective delivery of the goods (anticipatory price reduction) or *where* the value of the (non-)conforming goods has to be calculated.

Furthermore, the development of the price reduction remedy under CISG has been and will continue to be a source of inspiration for the emerging European contract law. The fact that the PECL and the DCFR include price reduction as a remedy and that the Consumer Sales Directive and the recent CESL in the CESL-proposal also provide for it, is proof that this remedy is still relevant and developing.

Finally, it has to be stressed that price reduction is indeed a remedy with a different rationale when compared to damages. It starts from the *do ut des*-idea: the buyer keeps the non-conforming goods, thereby maintaining the contract, and only has to pay a proportionally adapted price.

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termination has elapsed *see Christmas trees case*, No. BS 9700016-4; *Window frames case*, No. C/12709/2001; *Plants case*, No. 2 O 51/02 (implicitly); *Bottles case*, No. 2 U 923/06.